INTERNATIONAL LAW AND THE PRESERVATION OF UNDERWATER CULTURAL HERITAGE

CRAIG J.S.FORREST
B.COM, LLB, LLM

A thesis submitted in fulfilment of the requirements of the University of Wolverhampton for the degree of Doctor of Philosophy

November 2000

This work or any part thereof has not previously been presented in any form to the University or to any other body whether for the purposes of assessment, publication or for any other purposes (unless previously indicated). Save for any express acknowledgements, references and bibliographies cited in this work, I confirm that the intellectual content of the work is the result of my own efforts and of no other person.

Signature C J Forrest

Date 8 December 2000

Doctor of Philosophy

Abstract

INTERNATIONAL LAW AND THE PRESERVATION OF UNDERWATER CULTURAL HERITAGE

By Craig J.S Forrest

In 1997, the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) directed the Secretary-General of that organisation to prepare the first draft of a convention on the protection of the underwater cultural heritage. At the submission of this thesis the draft is still under negotiation, and a fourth Meeting of Governmental Experts is to be convened in early 2001 to continue deliberations.

This thesis seeks to achieve three objectives. Firstly, it seeks to critically evaluate the extent to which the structure and provisions of the UNESCO draft convention provide a basis for an effective, reasonable and enforceable preservation regime. Chapter 1 considers the value of the underwater cultural heritage to contemporary society, the regimes proposed to 'protect' these values and the conflict that has developed between the realisation of the economic and archaeological value of the underwater cultural heritage. Chapter 2 examines previous attempts to structure a preservation regime for underwater cultural heritage in international waters and introduces the UNESCO draft convention. It further critically evaluates the rationale for preservation expressed in the draft, the principles that underpin it and its scope. Chapter three critically assesses the proposed preservation regime, paying particular attention to the manner in which it attempts to resolve the conflict identified in chapter 1. Chapter 4 considers the jurisdictional structure proposed in the draft and the extent to which it conflicts with existing international law, particularly the 1982 United Nations Convention on the Law of the Sea.

The second objective of the thesis, considered in chapter 5, is to critically assess the process of drafting and negotiating this draft, particular attention being paid to the extent to which the process has tended to weaken the substantive provisions of the preservation regime.

Finally, in chapter 6, the thesis considers those principles that may emerge from this process and be contained in the draft, and which may be utilised in the future to further develop an effective, reasonable and enforceable preservation regime. This consideration is undertaken in the context of an evolving international law, which offers opportunities for the reorientation of the principles of the draft so as to give effect to the proposition that the underwater cultural heritage is the common heritage of humanity.

It is hoped that this thesis may prove valuable to those involved in the continuing negotiations to formulate a preservation regime for underwater cultural heritage and contribute to the implementation of the most powerful preservation provision contained in the draft convention - education.

TABLE OF CONTENTS

Acknowledgements

I would like to express my gratitude to my internal supervisors, Michael Williams and Paul Fletcher-Tomenius at the School of Legal Studies, University of Wolverhampton and to my external supervisor, Nicholas Sinclair-Brown at the Lauterpacht Research Centre for International Law, University of Cambridge, for their help and guidance in the preparation of this thesis. Without their considerable encouragement and support, this work would not have been completed.

I would like to express my gratitude to the following who gave up their time to discuss matters or to read and comment on various aspects of this thesis: Alan Aberg, Former Chairman of Nautical Archaeology Society; John Broadwater, National Oceanic and Atmospheric Administration, US; Professor David Bederman, Emory University; Pat Clyne, Treasure Salvors Inc; David Concannon, Feldman and Pinto, Attorneys at Law; Martin Dean, University of St.Andrews and UK Archaeological Diving Unit; Anthony Firth, Wessex Archaeology; Dr Anne Giesecke, Institute of Heritage Administration; John Gribble, South African Heritage Resources Agency and South African Delegate to the UNESCO Meeting of Experts; Greame Henderson, Western Australian Maritime Museum; Peter Hess, Adjunct Professor, Widener University; Gillian Hutchinson, National Maritime Museum, UK; Andrew Jackson, Foreign and Commonwealth Office and UK Delegate to the UNESCO Meeting of Experts; Samia Ladgham, Legal Officer, International Seabed Authority; Russ Lamotte, Attorney Advisor, US Department of State and US Delegate to the UNESCO Meeting of Experts; Marion McQuaide, Ministry of Defence and UK Delegate to the UNESCO Meeting of Experts; Eleftheria Mantzouka, East Carolina University; Professor James Nafziger, Willamette University and *Rapporteur* to the ILA Cultural Heritage Committee; Ian Oxley, Archaeological Diving Unit; Veronica Robbins, Receiver of Wreck, UK and Gregg Stemm, Odyssey Marine Exploration and US Delegate to the UNESCO Meeting of Governmental Experts.

I would also like to thank Kerry Martin for her invaluable help and advise in the preparation of this thesis.

List of Abbreviations

CS	Continental Shelf
CZ	Contiguous Zone
DOALAS	Division of Ocean Affairs and Law of the Sea
EEZ	Exclusive Economic Zone
E.T.S.	European Treaty Series
ICOMOS	International Council of Monuments and Sites
ILA	International Law Association
ILC	International Law Commission
I.L.M.	International Legal Materials
IMO	International Maritime Organisation
ISBA	International Seabed Authority
T.I.A.S.	Treaties and Other International Agreements Series (US)
UCH	Underwater Cultural Heritage
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
U.N.T.S.	United Nations Treaty Series
UK	United Kingdom of Great Britain and Northern Island
U.K.T.S.	United Kingdom Treaty Series
US	United States of America

Table of International Agreements

1970 Treaty of Co-operation Providing for the recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S no. 7088

1970 Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, September, 15 1981, T.I.A.S No. 10136.

1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, U.K.T.S. 10 (1974), Cmnd. 5524; T.I.A.S. No. 7570

1972 United Nations Declaration on the Human Environment

1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S.151

1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, T.I.A.S. No 8165

1973 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243

1976 Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, 15 I.L.M. 1350

1979 International Convention Against the Taking of Hostages, U.K.T.S 81 (1983), Cmnd 9100

1981 World Soil Charter, U.N.Doc C/81/27

1982 World Charter for Nature, G.A.Res. 37/7, U.N. Doc A/37/51

1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122; (1982) 21 I.L.M. 1261

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Misc.12 (1985), Cmnd. 9593; (1984) 23 I.L.M. 1027

1985 European Draft Convention on the Protection of the Underwater Cultural Heritage, Dir/Jur (84)

1985 European Convention on Offences Relating to Cultural Property, E.T.S. No.119

1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 21 March 1986 U.N Doc A/Conf.129/15; Misc. 11 (1987), Cmnd. 244; (1986) 25 I.L.M. 543

1989 London Salvage Convention, LEG/CONF.7/27, May 2, 1989

1989 Convention Concerning Indigenous and Tribal Peoples, 28 I.L.M 1382

1989 Hague Declaration on the Environment, 28 I.L.M 1308

1989 Agreement between the Government of the French Republic and the Government of the United States of America concerning the wreck of the CSS Alabama, Paris, Oct. 3, 1989, T.I.A.S. No. 11687

1990 Agreement between the Government of Great Britain and Northern Ireland and the Government of the Republic of South Africa regarding the Salvage of the H.M.S Birkenhead, Pretoria, Sept. 27, 1989, U.K.T.S. No. 3

1992 Rio Declaration on the Environment

1992 European Convention on the Protection of the Archaeological Heritage (Revised), E.T.S. No. 143

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

Table of National Legislation

Albania
Albanian Decree No. 4874 of 23 September 1971 on the Protection of Cultural Monuments, Historic Monuments and Rare Natural Objects

Australia
Australian Historic Shipwrecks Act No.190 of 1976, as amended by the Historic Shipwrecks Amendment Act No. 88 of 1980

Cape Verde
Law No. 60/IV/92, Dec. 10, 1992

China
Protection and Administration of Underwater Cultural Relicts Regulations 1989

Cyprus
Law No.4 of 1974

Denmark
Conservation of Nature Act as amended by Act.530 of 10 December 1984
The Protection of Nature Act No. 9 of 3 January 1992

France
Act Concerning Marine Cultural Property 89-874 of 1989 of 1 December 1989

Gambia
The Monument and Relics Act No.8 of 1974

Hong Kong
Antiquities and Monuments Ordinance 1971

Ireland
National Monuments (Amendment) Act No. 17 of 1987

Jamaica
Jamaican Exclusive Economic Zone Act 33 of 1991

Morocco
Moroccan Decree no.181179 of 8 April 1981

Netherlands
Monument Act of 1961
The Monument and Historic Buildings Act 1988

Norway
Cultural Heritage Act 1979, Act of 9 June No. 50
Royal Decree of 8 December 1972

Portugal
Law No. 289/93 of 21 August 1995

Seychelles
Maritime Zones Act 1977

Spain
Spanish Historical Heritage Law 16/1985 of 25 June 1985

Sweden
Act Concerning Ancient Monuments and Finds of 30 June 1988

Tunisia
Protection of Archaeological Property, Historic Monuments and Natural Urban Sites Law No. 86-35 of 9 May 1988

United Kingdom of Great Britain and Northern Ireland
Protection of Wrecks Act 1973
Protection of Military Remains Act 1986
State Immunity Act 1978
The International Seabed Authority (Immunities and Privileges) Order 1996

United States of America
Marine Protection, Research and Sanctuaries Act 16 U.S.C (1985)
National Historic Preservation Act 16 U.S.C (1985)
Proclamation on the Exclusive Economic Zone (No. 5030 48 Fed. Reg 10650 1983),
Abandoned Shipwreck Act 1987, (Pub.L.No.100-298, 102 Stat. 432 (1988)
US Foreign Sovereign Immunities Act 1976 26 USC 1330

Table of Cases

International

National

Canada

Netherlands

USA

The Sabine 101 U.S 384 (1880)
The Schooner Exchange v McFaddon (1812) 7 Cranch 116
Sea Hunt, Inc. v. Unidentified, Shipwrecked and Abandoned Vessel or Vessels 47 F.Supp. 2d 678; (E.D.Va. 1999)
Sea Hunt, Inc. v. Commonwealth of Virginia 221 F.3d 634; 2000 (4th Cir. 2000)
Subaqueous Exploration & Archaeology Ltd v The Unidentified Wrecked and Abandoned Vessel 577 F.Supp, 597 (D. Md. 1983)
Thompson v, One Anchor and Two Anchor Chains 221 F.770 (W.D.Wis 1916)
Treasure Salvors, Inc v. Unidetified, Wrecked and Abandoned Sailing Vessel 569 F.2d 330 (5th Cir. 1978)
United States v. Aluminium Co. of America, 148 F. 2d 416 (1945).
United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974)
United States v. McClain, 593 F.2d 658 (5th Cir. 1979)
Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F.Supp, 452 (E.D.Va. 1960)

UK

The Aquila, 165 Eng. Rep (1 C. Rob. 37) 87, 89 (adm. 1798)
Attorney-General of New Zealand v. Ortiz [1982] 3 W.L.R 570
Morris v. Lyonesse Salvage Co. (The Association and Romney) [1970] 2 Lloyd's Rep. 59
Pierce v. Beamis (The Lusitania) [1986] 1 Q.B.384; [1986] Lloyd's Rep. 132.
Simon v. Taylor and Others [1975] 2 Lloyd's Rep. 338 (Singapore High Court)

Introduction

The oceans have, and continue to be, the outer most reaches of humankind's exploration of this planet. Questions concerning the history and development of our relationship with the oceans remain unanswered. When humans first ventured into this unknown territory beyond the horizon is not known. Nor is it known what vessel was used, what belongings were taken, what path travelled, how it was navigated or where landfall was made. These, and question which have arisen since then could not be answered. All was lost to the oceans until humans were able to extend their exploration under the oceans; which revealed remains of our relationship with the oceans and earlier exploration of the planet - underwater cultural heritage[1]. Questions could now be answered.

This valuable but limited historical and archaeological resource is, however, under threat. Construction activities such a harbour dredging, land reclamation schemes and port development schemes have resulted in the total destruction of UCH, as has activities in deeper water, such as pipeline construction, deep seabed mining and oil and gas exploration. Fishing activities, particularly beam trawling, not only destroy the marine environment, but also any UCH which may lie in the path of the trawler's beams. While most of these activities completely destroy UCH, other activities affect its integrity. In particular, marine pollution causes an increase in the rate of deterioration of UCH. While these activities destroy or damage UCH, most cases are unintentional and occur without those undertaking the activity necessarily being aware of the UCH's existence until it is too late.

Other activities, however, are consciously directed at UCH, and which similarly threaten it. Many objects lost to the oceans have been valuable to humans, who have actively sought to retrieve them. To this day, many objects previously lost continue to be economically valuable[2]. From this view of objects primarily as economic goods recovered from the oceans in order to be reintroduced to the stream of commerce, developed a realisation that these objects could, on proper investigation, reveal important information about humans' past[3]. Unfortunately, the realisation of these values could not easily be achieved simultaneously, and the realisation of the former often resulted in lost of historical and archaeological information. This conflict remains even today. The development of this conflict is considered in the first chapter of the thesis, as is a consideration of the values attributable to the UCH in contemporary society and the regimes that have been proposed to ensure these values are 'protected'.

---

[1] Hereafter "UCH".

[2] Historic shipwreck (those that sunk more than 100 years ago) that have yielded significantly commercially valuable commodities include the *Duoro* (coins sold for £1.5 million, see Anon., "Mint Duoro coins draw the bidding" Diver (January 1997) p.46; *The Times* "Golden treasure from shipwreck to fetch £1.5m" September 7, 1996 p.11), the *S.S Central America* (see Kinder, G., *Ship of Gold in the Deep Blue Sea* (1998) The Atlantic Monthly Press, New York), *Neustra Señora de Atocha* (reputed to be worth $250 million; see Velocci, T., "Treasure Hunting: There's gold in them thar Galleons" *National Business* August 1980 p. 58-62), the *Cazador* (worth $50 million; see Summers, J., "Ten days on the Cazador" *Diver* (June 1996) pp.86-89), the Nanking Cargo and the *Diana* (worth £10 million and £1 million respectively, see *The Times* "Shipwreck gives up her hoard of perfect porcelain" January 25, 1995 p.4) . A significant number of recovery operations undertaken by treasure salvors indicated that the recoveries were expected to yield huge fortunes, but have yet to come to fruition. See, for example, the case of the *Hanover* (reported to be worth £50 million, see *Sunday Times* "Wreckfinder hits £50 m crock of gold" October 27, 1996 p.11; Anon., "Will the *Hanover* yield a fortune in gold?" Diver (December 1996) p.59; Anon., "*Hanover* – is the treasure still on board?" Diver (January 1997) p.47)

[3] See for example, "Fleet of Medieval Ships Discovered in Britain" *The Independent* October 24, 2000

Advances in diving technology have made access to UCH at any depth available to a growing section of the population. The increasing activity and competition directed at this finite resource has invoked the concern of a number of State Governments and international organisations, particularly the International Law Association[4] and the United Nations Educational, Scientific and Cultural Organisation[5]. The response to these problems has been to draft an international convention on the preservation of UCH.

This thesis seeks to achieve three objectives. Firstly, it seeks to critically evaluate the extent to which the structure and provisions of the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage[6] provides a basis for an effective, reasonable and enforceable preservation regime.[7] Secondly, the process of negotiating and adopting this preservation regime will be critically assessed, particular attention being paid to the extent to which the process has tended to weaken the substantive provisions of the anticipated preservation regime. Thirdly, consideration will be given to those principles that may emerge from this process and be contained in the resulting draft convention, and which may be utilised in the future to further develop an effective, reasonable and enforceable preservation regime. These objectives will be sought in chapters 2-6.

Attempts to provide for a preservation regime for UCH beyond coastal State jurisdiction began during the negotiations concerning the deep seabed in the 1970's. The current UNESCO initiative is a product of this ongoing process, and as such, the previous attempts will be considered in chapter 2. Of particular importance is the development of a number of principles throughout this evolutionary process upon which the UNESCO draft convention is based. The rationale and principles for the development of a preservation regime as expressed in the UNESCO draft convention are critically evaluated in chapter 2, as is the scope of the convention. The scope delineates the application of the provisions of the preservation regime to specific UCH in specific areas. It therefore concerns issues such as the definition of UCH, the geographical scope of the convention and the determination of activities that will be regulated. Negotiations concerning the scope of the convention have been particularly problematic. Chapter 2 will critically evaluate the proposed provision in the UNESCO draft convention and the subsequent negotiations that have proved difficult to resolve.

The UNESCO draft convention is an attempt to provide for a regime that will preserve the historical and archaeological value that can be derived from UCH. This is achieved primarily through the introduction of a set of technical standards of underwater archaeology which, it is proposed, will apply to any activity directed at UCH. The mechanisms utilised to achieve this are, however, controversial. In particular, the non-commercialisation of activities directed at UCH has been problematic and requires

---

[4] Hereafter "ILA". Founded in 1873, the International Law Association is a private non-governmental organisation of persons interested in international law. The headquarters are situated in London and has over 40 branches world-wide.

[5] Hereafter "UNESCO".

[6] Hereafter "UNESCO draft convention". While the actual draft has evolved, and various versions will be considered, this term will be used in a general sense to include all versions considered in the process of attempting to achieve a binding international convention. When a specific version of the draft convention is referred to, reference will be made to which particular version.

[7] Bator, P.M., *The International Trade in Art* (1983) University of Chicago Press quoted in Shestack, A., "The Museum and Cultural Property: The Transformation of Institutional Ethics" in Messenger. P.M., (ed.) *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press, Alberquerque p.1

reconsideration if a convention is to emerge from the negotiating process. The preservation regime is underpinned by the principle of State co-operation, which is reflected in the provisions that relate to the sharing of information concerning UCH, the seizure of illicitly recovered UCH; and the provision of educational, training and technological facilities. This preservation regime, and the negotiations concerning it, are critically assessed in chapter 3.

The UNESCO draft convention introduces a preservation regime that applies to a number of maritime zones, and is therefore of importance to the law of the sea. The importance of this sphere of law for the preservation of UCH lies in the jurisdiction that could be granted to States or an international organisation to administer the preservation regime in the interests of all humankind. The 1982 United Nations Convention on the Law of the Sea[8] governs jurisdictional issues in the sea, and is thus implicated in the negotiations at UNESCO. This Convention is arguably one of the most delicately balanced international agreements ever constructed, and is of profound importance to most States. There are therefore important concerns that this delicate balance is not upset. Such a possibility is, however, raised by the UNESCO draft convention, which has resulted in lengthy negotiations concerning the extent to which the UNESCO draft convention is compatible with the UNCLOS regime. The importance of these deliberations, the proposals made in this regard and the provisions relating to the compatibility between international agreements are critically evaluated in chapter 4.

The process of drafting and negotiating the provision of the UNESCO draft convention has been protracted and contentious. As noted by the *Rapporteur* of the ILA Cultural heritage Committee; "[i]f the trials, tribulations, uncertainties, and slow pace of progress seem familiar, perhaps that is because we are reminded of the halting growth of international environmental law and the law of the sea during the past half-century. It is so often a matter of time."[9] Given the dangers posed to UCH, time, however, is of the essence. A fourth Meeting of Governmental Experts is to be convened in early 2001 to continue consideration and deliberation of this convention. If a convention is to emerge from this process, it is necessary to consider the problems and deficiencies in the process to date which have impeded development and weakened the provision of the proposed preservation regime. Such consideration is undertaken in chapter 5. This chapter concludes by considering those provisions of the draft convention that may receive broad State consensus and anticipates the form of the convention which, it is expected, will emerge from this process.

The negotiation and drafting of this convention has taken place within the context of an evolving international law. In particular, the principles of sovereignty and jurisdiction are under pressure to evolve in order to address global economic, humanitarian and ecological concerns. The preservation of UCH, particularly beyond coastal State jurisdiction, is a global concern, and as such, the possibility arises of taking into account the developments in international law to structure an improved preservation regime. Such a structure may require the relinquishment of some sovereignty by States, and the vesting of the administrative power to govern activities directed at UCH to an international organisation. A concept often associated with cultural heritage, which provides a basis for the development of many of the principles that, it is anticipated, will be included in the resulting draft convention, is the concept of the common heritage of

[8] U.N Doc. A/Conf.62/122; (1982) 21 I.L.M. 1261. Hereafter "UNCLOS".
[9] Nafziger, J.A., "Historic Salvage Law Revisited" 31 *Ocean Development and International Law* 2000 p. 81

mankind.[10] This includes the development of a global administration for the preservation of UCH.

The evolution of the principles of international law and the extent to which the principles that make up the concept of CHM can be developed to provide the basis for an improved preservation regime for UCH in the future will be considered in chapter 6.

Chapter 7 concludes the thesis with an evaluation of the importance of the provisions of the anticipated draft convention and the process of drafting and negotiating the convention for the preservation of UCH.

Methodology

While extensive use was made of secondary material, relating mostly to terrestrial cultural heritage, the primary source of information used in this thesis was gathered during attendance at the second and third Meeting of Governmental Experts convened to consider the UNESCO draft Convention[11]. This included extensive discussion with many State Representatives, who are acknowledged *infra*. Supplementary material was obtained from participation at two meeting at the United Kingdom[12] Foreign and Commonwealth Office to discuss the UK position on the UNESCO draft Convention[13] and attendance at a number of national and international conferences.[14]

Materials used in this thesis are, to the author's knowledge, correct as at 31 October 2000.

Parts of this thesis, and other material not included in this thesis, have been published as; Fletcher-Tomenius, P. and Forrest, C., "Historic wreck in international waters: conflict or consensus?" 24 *Marine Policy* (2000) pp.1-10 and Fletcher-Tomenius, P. and Forrest, C., "The Protection of the Underwater Cultural Heritage and the Challenge to UNCLOS" 5(5) *Art, Antiquity and Law* (2000) pp. 125-158

[10] Hereafter "CHM".
[11] Held at UNESCO Headquarters, Paris during 19-24 April 1999 and 3 to 7 July 2000 respectively.
[12] Hereafter "UK".
[13] Held at The Foreign and Commonwealth Offices, London on 22 February and 1 December 1999 respectively.
[14] Papers presented by the author were delivered at the following conferences: "Cultural Heritage in International Waters: New Legal Perspectives" presented at the International Underwater Archaeological Symposium, Fort Bovisand, Plymouth UK, 1 March 1997; "New Laws for the Millennium – Archaeology AND Salvage?" presented at World Archaeological Congress, University of Cape Town, South Africa, 10 January 1999 and the National Shipwreck Conference, University of Plymouth 13 February 1999.

Chapter 1

Underwater Cultural Heritage: Emerging Values and Conflict

"Works of art and sculpture, artefacts, great monuments and temples have been prized throughout history as being of significant importance. This has been so, not only because of their aesthetic worth, but also because they represent the talent and endurance of man and the history of diverse civilisations."[1]

Introduction

In July 1999, UNESCO adopted a revised draft of a convention on the protection of the underwater cultural heritage.[2] Article 3, the general principle, reads;

"The State Parties shall preserve the underwater cultural heritage for the benefit of humankind in accordance with the provisions of this convention."

Thus, the provisions of this convention are drafted in such a way that through implementation by State Parties, it will be possible to preserve the UCH. Implicit in this general principle, is the assumption that it is possible to determine what the UCH actually comprises[3]. The terms 'underwater', 'culture' and 'heritage' are individually susceptible to various interpretations that are made no easier by their amalgamation. In particular, the term 'culture' is an all-embracing term that applies to every aspect of contemporary society. While the term 'heritage' denotes that which is received from predecessors, it does little to narrow the scope of the term 'cultural heritage'[4]. All that we are is an expression of the culture that we inherited, and which we may manipulate and pass on to future generations. Thus, the term cultural heritage is not susceptible to exacting interpretation. Nevertheless, there are aspects of what we have inherited from our predecessors that we might not wish to manipulate and which we may choose to pass on to future generations unaltered. The determination of what aspects of our cultural heritage we might wish to subject to such a scheme depends on the values we attribute to these aspects. Various schemes have therefore been based on definitions of 'cultural heritage' or 'cultural property' that, though not definitive of the terms, illustrates those aspects of the cultural heritage that may be selected for differential treatment. This differential treatment is ordinarily termed 'protective', a term susceptible to various interpretations depending on the values we recognise as

---

[1] Williams, S.A., *The International and National Protection of Movable Cultural Property: A Comparative Study* (1978) Oceana Publications, Inc p.52

[2] CLT-96/CONF.202/5 Rev.2 Paris, July 1999

[3] UCH is defined in article 1 (see Appendices II, III and IV), and is considered in Chapter 2.

[4] The term 'heritage' has been described as "a nomadic term that travels easily.... It sets up residence in streets broad and narrow, royal palaces and railway sidings.... It stages its spectacles in a promiscuous variety of venues, turning maltings into concert-halls, warehouses into studio flats.... Medieval castles automatically qualify for its protective mantle, as do Roman forts and Martello towers..." Raphael Samuel, as quoted in Hutter, M. and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press p.3

attributable to the cultural heritage. The first part of this chapter will seek to determine what values might be so regarded in relation to the cultural heritage and what types of differential scheme might be constructed under the term 'protection' to give effect to these attributable values.

A value recognised as attributable to cultural heritage is the archaeological and historical information that the cultural heritage may reveal about humankind's past. It will be argued in this chapter that the differential scheme that may be applied to cultural heritage that reveals this value is best described as 'preservation', both of the physical integrity of the cultural heritage and its ability to reveal archaeological and historical information. The recognition of this value requires the formulation of the principle upon which such a preservation scheme may be based. As such, the principles derived from the concept of intergenerational equity will be considered.

UCH is merely cultural heritage found underwater. However, UCH does differ to terrestrial cultural heritage in a number of respects, in particular with regard to the values that are recognised as attributable to UCH. These values exist as a result of the development of the underwater archaeology as a scientific endeavour, which has only recently begun to achieve a scientific status. It is thus appropriate to consider the development of this discipline and the conflicts that have developed with regard to the attributable values of the UCH. It is from this conflict that a need has arisen to structure an international framework to preserve UCH.

The importance and 'protection' of cultural heritage

While it may appear axiomatic that cultural heritage should be 'protected', its scope, importance and the basis upon which 'protection' is sought, is a complex and emotive issue. It embodies a number of competing, relative values that dictate the form 'protection' will take. It is necessary firstly, to determine the values that may be attributable to cultural heritage which make it worthy of 'protection'. They include the expressive value of the cultural heritage, its importance to the national culture and international co-operation, and as a medium of preserving archaeological and historical evidence. As the process of 'protection' is relative to the values recognised in the cultural heritage, the different forms the differential schemes described as 'protection' could take will be considered.

The values embodied in the cultural heritage

Cultural heritage is a body of contemporary material to which various values can be ascribed. The process of attributing a value is a dynamic social process, and as such, is susceptible to continual alteration[5]. Whilst a variety of values can be attributed to the cultural heritage, the following are regarded as generally attributable.

[5] For a discussion on the process of ascribing values to cultural heritage, see Carman, R.J., *Valuing Ancient Things: Archaeology and Law in England* (1993) Unpublished PhD Thesis, University of Cambridge and Klamer, A., "The Value of Cultural Heritage" in Hutter and Rizzo *op.cit* pp.74-87

The expressive value of cultural heritage [6]

Cultural heritage may not only have aesthetic value, but each individual item of cultural heritage may embody a unique sum of inherent values.[7] It may embody and express religious or moral attitudes, which gives the cultural heritage a divine sanctity. Non-religious objects may invoke feelings of nostalgia for people, events and cultures and express values such as heroism, ingenuity and leadership. They are a link to the past, the only objects to survive from a past age and convey the certainty, truth and reassurance of the past to the present. They reflect the common heritage of humankind and instil a sense of community and identity not only to individual cultures, but also to all humankind. They invoke emotions of pride, sorrow, pity, wonder and joy. The uniqueness of an item of cultural heritage lies not only in its physical attributes but also in the sum of emotions that only that particular item can engender.

Preservation of archaeological and historical evidence

"Cultural objects embody and preserve information".[8] In many cases, these physical relics are the only means by which we can reconstruct the past.[9] From these we can not only learn about the past, but also from the past.[10] The extraction of this knowledge can be a time consuming and expensive process, and ordinarily must be conducted *in situ*. The learning process does not, however, end once the cultural heritage has been extracted from its natural context as continuing scholarly investigations may be necessary in relating its significance within a wider context and to reconsider associations with new discoveries. Of all the values embodied in the cultural heritage, it is the archaeological and historical evidence[11] derived from the item that is mostly closely associated with the cultural heritage as an individual item. While a variety of cultural heritage items may give rise to similar expressive, nationalist, economic or international values, at times only the one item of cultural heritage can uniquely reveal specific knowledge about the past.[12]

Economic value

Economic considerations apply to cultural heritage. This includes the intrinsic value of the item of cultural heritage, its attributed value and its value as a tourist resource.

Many items of cultural heritage are constructed from materials that in themselves are highly valuable, most obviously gold, silver and precious stones. As long as the material

---

[6] This sub-heading has been borrowed from Merryman, J.H., "The Public Interest in Cultural Property" 77 *California Law Review* (1989) p.345

[7] Monden, A and Wils, G., "Art Objects as Common Heritage of Mankind" XIX *Revue Belge de Droit International* (1986) p.328

[8] Merryman (1989) *op.cit* p.353; see also Abramson, R.D. and Huttler, S.B., "The Legal Response to Illicit Movement of Cultural Heritage" 5 *Law and Policy in International Business* (1973) p.936

[9] McBryde states that "the past of human societies, remote in time, may never be revisited nor apprehended in reality." Thus, the artefacts from the past are the only mechanism from which we can reconstruct the past in the present. See McBryde, I. (ed.), *Who Owns the Past?* (1985) Oxford University Press p.2

[10] "Those who cannot remember the past are condemned to repeat it" Santayana, as quoted in Merryman (1989) *op.cit* p.354

[11] For the remainder of this thesis, when the term 'archaeological value' is used, it should be interpreted, unless otherwise stated, to mean archaeological and/or historical value or significance.

[12] The Rosetta Stone, for example.

has an economic value, the cultural heritage will have an economic value. The economic value of cultural heritage does not, however, only reflect its material value, but also reflects an attributable value. Thus, ordinarily the material value of the cultural heritage is only a fraction of the item's market value. This attributable value may be derived from the rarity of the object, its aesthetic qualities as well as its historical or archaeological importance. This attributed value is in itself a cultural expression of the importance of the cultural heritage. The market for cultural heritage is a billion-dollar industry, both legitimate and black market. Although many would argue that cultural heritage should not be subject to market forces, the stark reality is that they are, as are allocation of budgetary resources necessary for its support.

The cultural heritage is also a main basis for the ever-increasing tourist industry as monuments and museums are the subject of increasing tourist attention. As many of the world's greatest monuments are in developing States, they are reliant on the tourist revenue as a major contribution to their economies. Any cultural heritage, irrespective of its origin, may be considered as being of value to the State who directly benefits from its presence as a tourist attraction.[13]

Cultural nationalism

The world we live in is increasingly subject to opposing forces. On the one hand, global communications, interdependent economies, increasing international regulations and proliferation of international non-governmental organisations have resulted in an increasingly interdependent world. On the other hand, recent years have witnessed increasing national tensions, rise in ethnic nationalism, fundamentalism and fragmentation of political units.[14] In many recent cases, the emergence of new nation-States has been based on ethnic nationalism. What distinguishes each ethnic nation can be evidenced in their culture and their past, and in an age of increasing international interaction, these distinctions become important for each culture to maintain their own identity[15]. This is particularly true for those nation-States that received independence at the end of the colonial era and those nations emerging from the break up of the Eastern block.[16] Many older States are polyethnic States, yet strive to achieve a sense of nationalism amongst their citizens and may find expression for their contemporary nationalism from a combination of historical cultures.[17]

Cultural heritage can play an important part in this nationalisation process. The importance of cultural heritage as a national symbol emerged in the nineteenth century "as part of the historical self-consciousness of a number of European States."[18] The

---

[13] Museums dedicated to individual wrecks, such as the *Vasa* in Sweden, the *Mary Rose* in the UK and the *USS Monitor* in the US attract considerable tourist interest.

[14] Smith, A. D., *Nations and Nationalism in a Global Era* (1995) Polity Press, Cambridge p.2

[15] Thus, Koboldt defines cultural heritage as "an expression or representation of the cultural identity of a society in a particular period." Koboldt, C., "Optimising the Use of Cultural Heritage" in Hutter and Rizzo *op.cit* p.68

[16] These includes such new States as Georgia, Ukraine, Kazakhstan, Uzbekistan, Turkmenistan, Azerbaijan, Armenia, Krygystan and Tajikistan.

[17] For example, the dedicatory inscription at the entrance of the Mexican National Museum of Anthropology includes the paragraph, "[i]n the presence of the vestiges of those cultures, contemporary Mexico pays tribute to indigenous Mexico, in whose expression it discerns the characteristics of its national identity." See Mulvaney, J., "A Question of Values: Museums and Cultural Property" in McBryde, I. (ed.), *Who Owns the Past?* (1985) Oxford University Press p.86

[18] McBryde *op.cit* p.3

cultural heritage thus became a symbol of national identity, from which a nation may derive cultural pride, a sense of community spirit and common history. It may also act as a form of inspiration for all to emulate the great achievements of the past. Use of cultural heritage in contemporary society, including its use to bolster nationalism, is advocated by some international agreements, including the 1972 UNESCO Recommendations Concerning the Protection at National Level, of the Cultural and Natural Heritage, that declares in the preamble that it is "appropriate to give cultural and natural heritage an active function in community life".[19]

Cultural nationalism does not, however, necessarily refer to the culture that created the heritage. For example, although the Parthenon Marbles are unquestionably of Greek origin, and claimed by Greece as an important part of its cultural heritage, the Marbles could also be claimed to part of the English cultural heritage[20]. They were seized by a Scot, brought to England, and have been exhibited in England for over one and a half centuries. It helps provide revenue for England from tourists and may instil in the English a sense of pride in having the ability to amass and exhibit numerous items of cultural heritage such as the Parthenon Marbles. Thus, one item of cultural heritage may be of importance to more than one national culture. In the case of an archaeologically or historically important shipwreck, the items from the wreck will often have originated in different nations, and their use by international seafarers may result in a number of States claiming the wreck and all artefacts as their national cultural heritage[21]. For example, the discovery of a Chinese trading vessel, sunk in 1414, off the coast of the Philippines in 1993 was hailed as a boost for Filipino national pride. President Fidel Ramos said the wreck and the artefacts recovered "prove we had a long and glorious history of economic interaction with our Asian neighbours. What could be a better source of inspiration for us Filipinos as we collectively prepare for the challenges of the 21st century."[22]

Universal culture

While recognising that objects may constitute the cultural heritage of a particular nation, many of these objects of national cultural heritage have also been regarded as evidence

---

[19] See further Appendix VII

[20] A great deal has been written about the Parthenon Marbles and the controversies surrounding it's continued retention by the British Museum. For a discussion on the Parthenon (Elgin) Marbles, see Merryman, J.H., "The Retention of Cultural Property" 21 *University of California Davis Law Review* (1988) pp.493-495; Bator, P.M., "An Essay on the International Trade in Art" 34 *Stanford Law Review* (1982) p.307; Williams, S.A., "Recent Developments in Restitution and Return of Cultural Property" 3 *The International Journal of Museum Management and Curatorship* (1984) p.124; McBryde *op.cit* pp.4-6; Meyer, K.E., The Plundered Past (1973) Atheneum pp.170-180; Greenfield, J., *The Return of Cultural Treasures* (1989) Cambridge University Press pp.47-105. It is interesting to note that a number of friezes from the Parthenon were loaded by Lord Elgin onto the vessel *Mentor*, which sunk in 20 meters of water outside Kythera. These pieces were recovered by free divers and finally reached the British Museum. See Blott, J-Y., *Underwater Archaeology: Exploring the World Beneath the Sea* (1995) Thames and Hudson Ltd p.14

[21] For a discussion on the importance of ships in the constitution of nationality, see Firth, A.J., *Managing Archaeology Underwater* (1996) Unpublished PhD Thesis, University of Southampton pp.134-138

[22] Gee, A.L and Lopez, A., "Pride from the Deep: The ocean bed delivers proof of the Philippines' role in Asia's trading history" downloaded from *http://cnn.com/ASIANOW/asiaweek/96/1129/feat3.html.* Similarly, artefacts recovered form sunken Spanish galleons off the coast of Florida, USA have been described as 'America's heritage'. See Pendelton, E and Cox, R., "Trouble with treasure" in Cunningham, R.B., *Archaeology, Relics, and the Law* (1999) Carolina Academic Press p.10

of the common history of all humankind.[23] For example, as all humankind descends from a common ancestor, archaeological remains of their earliest tools and skeletal remains, and the knowledge derived from their examination, are not only important to the State in which they are found, but to all peoples[24]. The history and development of our species is one history, and the culture of the world is greater than the sum of individual cultures. This sentiment is pervasive in academic writings on the cultural heritage[25]. For example, Warren states that "many cultural properties have artistic, scholarly and educational value which constitutes the cultural heritage of human society"[26], while King regards cultural heritage as "the property of humankind as a whole since it represents the achievement of a part of all humankind that cannot be set apart from other achievements, in other geographical places."[27]

Thus, it has been stated that "the art of ancient mankind is part of mankind's cultural heritage, and does not belong exclusively to that particular spot where ancient cultures flourished."[28] This does not deny that the State in which the cultural heritage is situated does not have some claim to the cultural heritage, only that that claim is not exclusive. Thus, as Firth point out, "some people can claim greater affinity with some ancient material than others."[29] Within the existing structure of international law, it is therefore necessary to ensure that both the interests of the State in whose territory the objects are found and that of humankind are given effect. It is thus incumbent on the holding State to ensure that the interests of humankind are taken into consideration when decisions are made concerning items of cultural heritage, such as terms of access, dissemination of information as well as physical protection.

Promotion of international understanding and co-operation

Given the increasing interdependence of States it may appear that a stage could be reached in which the concept of the nation-State is no longer tenable, and the world is governed by a supranational system. This, a number of writers conclude, is an extremely unlikely occurrence.[30] This does not mean to say that States will retain the levels of autonomous sovereignty that may exist today, and greater degrees of co-operation may evolve.

Cultural heritage can play an important part in the political interplay between States. The promotion of understanding between the increasing number of independent States, and an appreciation of the differences between the varied national cultures, has been advanced as a reason for protecting the cultural heritage. The "feelings arouse[d] by the

---

[23] Merryman used the phrase cultural internationalism to refer to the recognition of cultural heritage as being the cultural heritage of all humankind. The term universal culture is used in this thesis, but is to be regarded as synonymous with cultural internationalism. Merryman, J.H., "Two ways of thinking about cultural property" 80 *American Journal of International Law* (1986) p.837

[24] In 1999 a number of sites from which important hominid remains have been found were added to the World Heritage List, including the sites of Sterkfontein, Swartkrans and Kromdraai in South Africa. See World Heritage List at *http://www.unesco.org/whc/heritage.htm#debut*

[25] See for example, Williams (1978) *op.cit* p.52; Merryman (1986) *op.cit* p.837

[26] Warren. K.J., "A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press p.5

[27] King, J.L., "Cultural Property and National Sovereignty" in Messenger *op.cit* p.199

[28] Meyer *op.cit* p.28

[29] Firth *op.cit* p.158

[30] Smith *op.cit* p.160

contemplation and study of works of the past do much to foster mutual understanding between nations"[31] and "enriches the cultural life of all people and inspires mutual respect and appreciation..."[32]. The return and restitution of cultural heritage may foster good will between States, but may also lend itself to more problematic political uses as a bargaining tool.[33]

Cultural heritage as a human right

In the 20th century, the atrocities committed during the World Wars, as a result of the rise of Nazi and Fascist dictatorships, led to the recognition of rights based on the individual.[34] The extent of these rights accorded to the individual has grown in scope in recent years. More recently, groups have emerged as the subject of rights in international law[35]. Recent proposals have recommended that within the bundle of rights accorded to such individuals or groups should be cultural rights[36]. For example, in 1994 the Council of Europe suggested that the European Convention on Human Rights could be amended so as to include an article protecting cultural rights[37]. Thus, groups may have the right to a cultural identity, which they are free to develop and protect. Within these rights, lies the possibility of rights existing in relation to the physical manifestations of their culture. Such rights could include the right to the return of cultural heritage, or the right not to have the cultural heritage destroyed.[38] The recognition of these rights to the cultural heritage as human rights provides for a stronger international protective regime than those that currently exist under international treaties. It may, for example, facilitate more effective remedies, as generally related violations may trigger *erga omnes* obligations, which means that any State can enforce these rights.[39] Such State enforcement could possibly take place in international tribunals and could entail one State taking action against another State if the latter has violated a right relating to cultural heritage as a human right, within the

---

[31] Preamble to the 1956 UNESCO Recommendations on International Standards Applicable to Archaeological Heritage

[32] Preamble to the 1972 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and transfer of Ownership of Cultural Property, 1037 U.N.T.S. 151. Hereafter "1972 UNESCO Convention"

[33] For example, the agreement between the US and Mexico in which the US agreed to impose import restrictions of pre-Columbian cultural heritage was partly based on obtaining agreement from Mexico to co-operate in anti-drug trafficking operations by the US. Similarly the return of the Crown of St. Stephen to Hungary in 1977 gave the ruling socialist government an heir of legitimacy. See further Merryman (1989) *op.cit* p.351

[34] Baslar. K., *The Concept of the Common Heritage of Mankind in International Law* (1998) Martinus Nijhoff Publishers p.11

[35] See, for example, the 1989 Convention Concerning Indigenous and Tribal Peoples, 28 I.L.M 1382. A more detailed discussion on the meaning of 'culture' and the delimitation of different cultures, is beyond the scope of this work. For further reading on this topic, see Kamenka, E., "Human Rights and peoples rights " and Prott, L.V., "Cultural Rights and Peoples' Rights in International Law" in Crawford, J., (ed.) *The Rights of Peoples* (1988) Clarendon Press, Oxford; Blake, J.A., *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts with Special Reference to Turkey* (1996) Unpublished PhD Thesis, University of Dundee pp.1-58

[36] Brodie *et.al*, for example, states that "the destruction of cultural heritage should be treated as a violation of human rights" Brodie, N., Doole, J. and Watson. P., *Stealing History: The illicit trade in cultural material* (2000) The McDonald Institute for Archaeological Research p.12

[37] Draft List of Cultural rights (Strasbourg, August 1994). Council of Europe document CDCC Misc (94) 3. See Blake *op.cit* p.13

[38] Thus, destructive acts against the physical cultural heritage of a group, as occurred during the recent conflicts in the Balkans, would amount to a human rights abuse.

[39] For the original statement on *ergo omnes* obligations see *Barcelona Traction, Light and Power Company. Limited (Belgium v. Spain)* 1970 I.C.J. 4.

latter State's territory[40]. The infringing State could not hide behind the exclusivity of autonomous sovereignty in order to evade culpability for the human rights abuse.[41]

While such rights have yet to obtain normative status within international law, the evolutionary nature of the latter poses possibilities in this regard. At the very least, the emerging tendency to discuss such cultural heritage rights as human rights goes to indicate the growing importance of cultural heritage rights.

The meaning of 'protection'

The term 'protection' in relation to cultural heritage refers to the process of ensuring that some attributable value of the cultural heritage is assured of recognition and treated accordingly[42]. It thus has a considerably wide ambit.

Physical protection

Protection in this sense ensures that the physical integrity of the cultural heritage is preserved. Most of the values attributed to the cultural heritage will be served by its physical preservation. This would appear to be axiomatic. However, some items of cultural heritage were never intended to be preserved, and the purpose for which they were originally devised was either for them to be consumed or be allowed to deteriorate. This is most commonly associated with items of cultural heritage in graves and tombs. In such a case, physical preservation may stand in stark contrast to the religious beliefs of a section of contemporary society, necessitating an evaluative comparison in the values.[43] A conflict naturally arises between those who wish to preserve the cultural heritage and those who belong and still practise the beliefs of the creating culture. Physical preservation also necessarily presumes the preservation of the whole, so that while an item of cultural heritage may still exist if broken into parts, the physical and cultural integrity of the whole will be destroyed.[44] This may, however, be subject to any threat posed to the cultural heritage, so that division of the whole will preserve at least part of the cultural heritage when the whole is under threat from total destruction.[45]

---

[40] It should be noted that the resolution of international disputes in international tribunals is mostly conducted on the basis of State consent to the jurisdiction of the tribunal.

[41] Weiss, E. B., *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989) United Nations University, Transnational Publishers p.10

[42] See further Merryman, J.H., "Protection of the Cultural Heritage?" *38 American Journal of International Law* (1990) p.522; Aldape, A.G., "The International Protection of Cultural Property" *Proceedings of the 71st Annual Meeting of the American Society of International Law* (1977) pp.196-207; Antonio, L.K., "The current status of international art law" 10 *Suffolk Transnational Law Journal* (1986) pp.51-86

[43] See, for example, the conflicts surrounding the Kennewick Man in the US.

[44] For example, stele pried from a Mayan temple in Guatemala would damage or entirely destroy the physical integrity of the temple, see *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). Similarly, the removal of the Pathenon marbles by Lord Elgin extensively damaged the physical integrity of the Parthenon as a single entity. See further Bator, P.M., *The International Trade in Art* (1982) The University of Chicago Press p.20

[45] In the case of cultural heritage in developing States, it has been argued that if the State is unable to protect the cultural heritage from physical destruction, either from the elements or from illicit excavations, then they should be allowed to be removed to another State. This argument was used to support the retention of the Parthenon Marbles in the UK as it was suggested that to return them to the Parthenon would put them under threat from the atmospheric pollution of Athens. The original removal of the Marbles was also justified as preserving them from physical destruction from the invading Turks. See further Merryman (1989) *op.cit* p.358

There may also exist a threshold level of integrity, depending of the nature of the item of cultural heritage or site, so that items may be removed before that threshold is reached. The determination of this threshold is, however, complex and dependent on the values attributed to the cultural heritage. It may be that an item of cultural heritage will be more economically valuable if divided into parts, while the archaeological and historical information derived from the cultural heritage would thereby be diminished.[46] Determination of such issues also calls into question the conceptualisation of what constitutes a single item of cultural heritage.[47]

Protection in situ

Although the physical integrity of the cultural heritage can be ensured, its removal from its natural and archaeological context may undermine its value as a means of preserving archaeological and historical evidence. This decontextualisation results in cultural heritage devoid of provenance and meaning. What remains may be of economic and aesthetic worth, but cannot contribute to the sum of knowledge about our shared past. While preservation *in situ* undoubtedly has the possibility of preserving the archaeological value of the cultural heritage intact, the degree of decontextualisation that warrants this protective measure is debatable. So, for example, while some objects can be removed from their context while losing little of their archaeological value, others cannot.[48] The extent to which the cultural heritage can be recontextualised will naturally be an important consideration. Thus, the need for protection *in situ* can only be evaluated on an individual basis and a determination made as to the threshold level of decontextualisation.

Protection of visibility and accessibility

The expressive values of the cultural heritage can only be given effect if it is visible and accessible to the public. Measures for ensuring this may fall within the term 'protection'. Some States argue that cultural heritage, irrespective of its provenance, should be made visible to as many people as possible and accessible to leading scholars. Thus, it could be argued, ancient Greek or Egyptian artefacts should not necessarily be retained in their source States, but should be allowed to be exported to other States which can provide a greater degree of visibility to a larger audience, while allowing greater access to scholars. In cases where duplicates exist in a source State, these arguments should encourage the exchange of cultural heritage. As conflicting interests affect the visibility and accessibility of cultural heritage, Bator submits that the solution lies in variety[49]. Thus no exclusive measure should prevail, and where possible, the measures should allow visibility and accessibility, either in the source State or importing State, as circumstances dictate.

---

[46] For example, The Mel Fisher Centre, Inc reported the recovery of 25,000 lead musketballs from the wreck of a Spanish Galleon of the 1715 fleet. If sold for $20 each, half a million dollars would be raised. However, it was argued that such a collection of musketballs should not be divided up, as they would reveal more information as a collective whole than they would individually. For example, metallurgical study would reveal the mean variation in quantities of various metals used in the manufacture of the musketballs and the metals geographical origins.

[47] See for example, Bator (1982) *op.cit* p.20

[48] Bator (1982 *Stanford Law Review*) *op.cit* p.298

[49] *Ibid.*p.300

The delicate nature of some items of cultural heritage does not lend themselves to greater visibility and access[50]. This might be so in some cases where, for example, the UCH is better preserved in the marine environment, though this provides less visibility and access. Given the increasing number of sports divers qualifying each year, it may be that the visibility and access to some of these UCH sites are in fact increasing, though it would certainly be less than that achieved if the UCH was recovered and housed in a publicly accessible institution.[51]

Retention of cultural heritage

"Most States attempt to retain their cultural heritage.[52] This is particularly true for source States, most commonly developing States from South America, Africa and Asia, which are rich in cultural heritage items though poor in all other respects. Retentive schemes are often described as a means of 'protecting' the cultural heritage.

The retention of cultural heritage may, however, be antithetical to developing State economic policies, which would encourage exports in order to earn the foreign currency necessary to buy imports and finance domestic growth. There are a number of reasons for this; foremost of which is the romantic ideal of nationalism, particularly important to many source States, which have only recently become independent. The cultural heritage is a manifestation of this nationalism, necessitating its presence within the nation territory. The extent to which this is true depends on each item of cultural heritage. For some items of cultural heritage, the culture that gave the item its cultural significance is not only still alive and flourishing, but still makes use of the cultural item for the religious or ceremonial purposes for which it was designed.[53] In other cases, although having a high cultural value, the cultural heritage is viewed as a relic of the past and a representation of that past, rather than the present.[54] Merryman suggests that in the case of the cultural heritage falling in the latter category, cultural nationalism is an inadequate justification for retention. Thus, he argues, the Parthenon Marbles would still be Greek and honour Greece's past if it were still held in the British Museum. While this may be true, it can also be argued that the cultural heritage is still inherently Greek, and the decision of whether and why it should be held in Greece should be determined by that State. At best, it would be the responsibility of other nations to indicate why Greece should not hold it.

Closely allied to the ideal of cultural nationalism, is the argument that the retention of cultural heritage promotes the general welfare of the nation. Thus, a nation can relate better than others to an item of cultural heritage produced by that culture; it can be enriched by the interaction with the cultural heritage and stimulate a feeling of national pride. While this may be true of property held in public collections, it is not necessarily

---

[50] For example, in the case of the rock art in the caves of Lascaux France, the mere exposure to light threatens the integrity of the paintings. The caves are therefore no longer made accessible to the general public.

[51] The continued debate concerning the recovery of items from the wreck of the *R.M.S Titanic* often turns on whether making these items available for public viewing serves any beneficial public purpose, as the recovering company RMST maintain.

[52] Merryman (1988) *op.cit* p.477.

[53] For example, the Afo-A-Kom, a sculpture originating from the Kom peoples of the Cameroon, which was stolen and exported to the US. The First Secretary of the Cameroon Embassy stated that "It is beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together. It is not an object of art for sale and could not be." As quoted in Merryman (1988) *op.cit* p.495.

[54] This might apply, for example, to ancient Egyptian, Greek or Roman remains.

true of cultural heritage in private collections, and Merryman argues that in the case of the latter, these arguments do not justify cultural retention[55]. While this may be true, it will naturally depend not only on the particular item in question, but also on the other reasons for retention. In the case of source States with a large number of potential cultural heritage items as yet undiscovered, the imposition of retentive laws may prove to be a disincentive for excavation as the items cannot be exported, and may be subject to expropriation. To this extent, the retentive laws may promote preservation *in situ* and lesson the risk of decontextulisation of the cultural heritage by its removal. It may, however, also impede the acquisition of knowledge through excavation.

Merryman argues that retentive laws may serve as an 'opportunity preservation' device for cultural heritage in private collections in the sense that as long as the cultural heritage remains under the State's jurisdiction, there will always be the possibility of the owner donating the item to the State, beneficially or in lieu of taxes, or for the State to expropriate the cultural heritage. However, while the embargo laws apply to the State as much as it does to any individual, there must be a further justification for such a scheme rather than purely economic, which Merryman suggests.[56] The most obvious justification is cultural nationalism.

Those who control the cultural heritage, control the past in the sense that they are not only able to exhibit the heritage, but may also control its interpretation, scholarly study and place in a wider global context. Thus, retention policies may be utilised by States, or groups within States to control what can be learnt about the past from the physical cultural heritage.[57]

It is the sum of the reasons for retention that should prevail, though each, in itself may provide little justification. Merryman convincingly argues that for some categories of cultural heritage, blanket retentive laws do not necessarily 'protect' the cultural heritage and that the justification for their implementation based on cultural nationalism is often unconvincing. Nevertheless, on the whole, it should be recognised that cultural nationalism and allied justifications discussed above do provide a *primae facie* case for retentive laws.

The retention of cultural heritage, as a 'protective' measure based on the perception of the cultural heritage as being national in character, is pervasive, particularly amongst developing States. Merryman divides the means by which States do this into three categories of laws; 'expropriation laws' where the cultural heritage is declared to be State property[58]; 'embargo laws' where the State prevents the export of cultural heritage;

---

[55] Merryman (1988) *op.cit* pp.498-501.

[56] *Ibid* pp.501-503

[57] See Trigger, B., "The Past as Power: Anthropology and the North American Indian" in McBryde *op.cit* pp.11-40

[58] For example, Mexico, Guatemala, Ecuador and Costa Rica declare cultural heritage to be State property. Prott, L.V. and O'Keefe, P.J., *Law and the Cultural Heritage: Volume 1, Discovery and Excavation* (1984) Professional Book Ltd pp.188-197. However, the implementation of these laws does not appear to have any affect until the cultural heritage is to be exported. Thus, cultural heritage in private collections ordinarily remains in private collections, and it is only when that private owner attempts to export the cultural heritage that the State enforces these expropriation laws. Merryman therefore suggest that "the declaration of state ownership may be an empty formalism, intended primarily for a foreign audience..." . For an application of these laws, see *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) *and United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). Merryman (1988) *op.cit* p.488

and 'pre-emption laws' where the State or a domestic institution, such as a museum, is given the pre-emptive right to purchase any cultural heritage offered for export.[59]

While the enforcement of these laws would ordinarily be the sole preserve of the source State, these States have become more active in requesting market States to enforce their retention laws.[60] This is quite obviously the case where the cultural heritage has been illegally exported, and perhaps has been stolen, from the source State[61]. In this case the source State may claim restitution of the cultural heritage. It may also be that, in the interest of cultural nationalism, a source State claims the return of cultural heritage that had been legally removed some time ago.

Restitution of cultural heritage

The right to restitution of illegally acquired objects originated in times of war and is closely associated with the emerging international law of nation-States; this right appearing in the 1648 Westphalian Peace Treaties[62]. Today the right to restitution applies to situations in which the cultural heritage has been exported from a source State without the consent of that State.[63]. The cultural heritage may not only have been illegally exported, but may also have been stolen from the owner in the source State, be that owner the State or a private individual.

Ordinarily ownership laws of one State will be recognised by another State, subject to the possible rights of purchaser in good faith and the operation of statutes of limitations or rules of prescription. An owner of cultural heritage will therefore be able to enforce his ownership rights in cases where the heritage has been stolen and exported to another State.[64] In the case of embargo laws, a court will ordinarily not enforce the foreign laws

---

[59] *Ibid* p.478. See also Williams (1984) *op.cit* p.117

[60] Few market States have, however, been willing to do so. The US has arguably been the most co-operative in this respect. For further detail on the US policies, see Merryman (1988) *op.cit* pp.480- 482; Abrahmson *et.al op.cit* pp.932-970; Prott, L.V., "Problems of private International Law for the Protection of the Cultural Heritage" V *Recueil des Cours* (1989) pp.219-318

[61] The illicit traffic, theft, clandestine excavations and illegal export or import of cultural heritage has increased dramatically over the past few decades. The demand and value of cultural heritage has resulted in a dramatic increase in illicit traffic from source countries, most commonly third world countries in Africa, Asia and South America, to the more affluent market countries of Europe and North America. The end of the era of colonialism left many nations devoid of their cultural heritage. What little remained was soon in demand by western countries and illicit trafficking increased. In an attempt to stem the flow of illicit traffic, UNESCO adopted the Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1964. As the recommendation was not binding on States, it did little to stem the flow of illicit traffic, and a number of countries most affected by illicit traffic of cultural heritage, most notably Mexico, Argentina, Brazil, Costa Rica, El Salvador, Guinea, India and Peru, called for a binding international convention, which lead to the drafting of the 1970 UNESCO Convention. See further Jote, K., *International Legal Protection of Cultural Heritage* (1994) Jurisförlaget pp.116-124 and Williams (1978) *op.cit* p.179. See also Appendix VII

[62] Monden *op.cit* p.330

[63] For a discussion on some interesting cases of the restitution of cultural heritage, such as ten to twelve thousand Ecuadorian artefact returned from Italy to Ecuador and the restitution of the Nigerian terracotta sculpture 'Nok' from Canada to Nigeria, see Williams (1984) *op.cit* pp.119-124.

[64] For example, in *Kunstammlungen zu Weimer v. Elicofon* 536 F.Supp. 829 (E.D.N.Y 1981), affirmed 674 F.2d 1150 (2d Cir. 1982), two Durer paintings were stolen from the East German Government Museum, exported to the US and sold to Elicofon, who was unaware that they were stolen and bought them in good faith. The US court recognised the ownership of the East German Government and ordered the return of the paintings to Germany, without compensation to the purchaser in good faith. A similar approach has been followed in the Netherlands. See *Hooge Rad der Nederlanden*, 445 N.J 1402 (1983).

in the absence of a bi-lateral or multi-lateral treaty.[65] This is based on the principle that the courts of one State will not enforce the public or criminal laws of another State. Therefore, the importation of the cultural heritage would have to be declared illegal before the market State would take any action. The matter can be further confused when, as a result of the illegal export, the source State declares the cultural heritage to be confiscated and forfeited to the State[66]. Thus, enforcement of the embargo laws of the source State by the market State would effectively be transferring ownership to the former State. Thus, questions of ownership become entangled with the application of public laws. Similarly, in cases where States apply expropriation laws, difficulties arise. For example, a number of States apply expropriation laws which declare all cultural heritage found within the State to be State property, irrespective of whether the heritage is in a museum, in a private collection or still undiscovered underground. If the heritage is then removed from the source State to a market State, the source State would simple have to declare the heritage to be from its territory to become owner. A number of market States, however, will require more than this simple assertion of ownership and therefore will not ordinarily recognise these expropriation laws.[67] Questions of conflict of laws therefore play an important part in the restitution of cultural heritage. This is a complex issue, which is beyond the scope of this thesis.[68]

Return of cultural heritage

The romantic ideal of nationalism is the basis upon which most requests for the return of cultural heritage are sought. The return of cultural heritage is distinguished from the restitution of cultural heritage in that the former was not removed from the source State illegally, at least in the sense that it was not contrary to the source State's laws at the time of the removal. Therefore, questions concerning the return of cultural heritage are largely dealt with on a case-by-case basis through diplomatic channels. UNESCO and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin or its Restitution in Cases if Illicit Appropriation[69] supplement the diplomatic process by serving as a committee of 'good offices' to achieve return of cultural heritage[70]. The most documented and famous request for the return of cultural heritage relates to the Parthenon Marbles.[71] These have yet to be returned to Greece by

---

[65] The 1970 UNESCO Convention was adopted to remedy this situation, but was only partly successful.
[66] See, for example, *Attorney-General of New Zealand v. Ortiz* [1982] 3 W.L.R. 570
[67] It is for this reason that the 1970 UNESCO Convention only applies to cultural heritage stolen form a source nations "museum or a religious or secular public monument or similar institution..."
[68] For a more detailed discussion on this aspect of restitution, see Williams (1984) *op.cit* pp.117-129; Merryman (1988) *op.cit* pp.477-513; Mulvaney *op.cit* pp.86-98; Wilson, D., "Return and Restitution: A Museum Perspective" in McBryde *op.cit* pp.99-106
[69] This Committee was established at the 20th Session of UNESCO General Assembly in 1978. For a more detailed introduction to this committee, see Greenfield *op.cit* p.221
[70] For a discussion of examples of cultural heritage which have been returned, particularly from former colonial powers to their former colonies, see Williams (1984) *op.cit* pp.125-127
[71] For a discussion on the basis of claims for the return of cultural heritage see Monden *op.cit* pp.333-335. The authors argue that 'the integrity of works of art has developed into an internationally recognised principle'. By this it is meant that the reconstitution of parts of a cultural heritage item or site is a valid justification in international law for the return of cultural heritage to the source State. The argument concludes that on this basis, the Elgin Marbles should be returned to Greece. Confusion is however, introduced when the authors concedes that as article 15 of the 1970 UNESCO Convention encourages State's to conclude special agreements on the return of cultural heritage, it is implicit that there is no legal duty to do so. See also Frigo, M., "The proposed EEC Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State" 2 *International Journal of Cultural Property* (1993) pp.418-422

the UK. Other requests have been more successful, including the return of the crown of St.Stephens to Hungary and the Afo-Kom to Cameroon.[72]

It may be concluded that, subject to special circumstances, a State may be justified in retaining cultural heritage that legitimately constitutes its national cultural heritage. The retention of the entire cultural heritage in a particular State would not, however, be desirable as it ignores a number of other values that could conceivably be of benefit to the source State, such as the improvement of international relations and co-operation through cultural exchanges[73]. Arguably the most important value of the cultural heritage is to humankind as a whole, as it is evidence of a shared past and a basis for a shared future.

Conclusion

This discussion of the importance of the cultural heritage indicates some of the competing values embodied in the cultural heritage and some of the 'protection' strategies advocated to reflect these values. At times, these values may co-exist, while at other times, they may stand in contrast to one another. When such a conflict in values occurs, a resolution can only be obtained by weighing the relative values against one another. In relation to the physical cultural heritage, the majority of inherent values will be achieved through the physical preservation of the artefact itself.

The archaeological value of the physical cultural heritage is not, however, derived solely from its physical preservation, but rather from scientific investigation, which is maximised through *in situ* investigation. This process of *in situ* investigation ensures that the physical cultural heritage is considered within the natural and archaeological context in which it is found. Similarly, the historical value of the physical cultural heritage may be maximised through its continued placement within its physical historical context. Unscientific recovery and removal of the archaeological and historical cultural heritage from its natural or archaeological context may result in a loss of valuable information. In order to maximise the archaeological and historical value of the cultural heritage, it is important to ensure that not only is its continued physical integrity assured, but that its contextual integrity is similarly assured. Recognition of the archaeological and historical value of the cultural heritage may, however, conflict with other attributable values, particularly economic. While such conflicts may occur, they are not necessarily antithetical and there is no reason theoretically why these values cannot exist in relation to the same cultural heritage, with the proviso that, given the uniqueness of the information that may be obtained from the *in situ* investigation of cultural heritage, this value should be given preference to any others. Thus, the 'protective' scheme applicable to this value is that of *preservation*, not only of the physical integrity of the cultural heritage, but also of the cultural heritage's natural and archaeological context. The use of the term 'preservation' allows a distinction to be drawn between such a scheme and other schemes that attempt to give effect to other

[72] Other examples include the return of carved stone taken from the Temple of the Cross to Mexico by the Smithsonian Institute, see Herscher, E., "International Control Efforts: Are There Any Good Solutions?" in Messenger *op.cit* p.117. For a detailed account of a number of request for the return of cultural heritage, see generally Greenfield *op.cit*

[73] The preamble to the 1968 UNESCO Recommendations Concerning the Preservation of Cultural Property Endangered by Public and Private Works states that the "contemporary civilisation and its future evolution rest upon... the cultural traditions of the peoples of the world, their creative force and their social and economic development."

values attributable to the cultural heritage. It should be noted that preservation may, but does not necessarily ensure that the economic value of the cultural heritage is maintained. It is important to consider that this archaeological and historical evidence that is derived from the cultural heritage is a value that, though initially dependent on the physical and contextual integrity of the cultural heritage, is an entity in itself. As will be considered in a later section, concerns of underwater archaeologists relate to ensuring that both the physical integrity of the cultural heritage in maintained and that the archaeological and historical evidence derived therefrom is maximised.

Preservation principles

Preservation is the preferred differential scheme applicable to cultural heritage that may provide valuable archaeological and historical information. Preservation can be defined as those activities that keep an object safe or free from decay or decomposition. However, to extract the valuable archaeological and historical information from the cultural heritage, may require the undertaking of an activity that is detrimental to the physical or contextual integrity of the cultural heritage. The framework within which consideration of such activities should take place is based on the concept of intergenerational equity.

Within the context of cultural heritage, intergenerational equity is necessary to ensure that future generations are able to study and learn from the cultural resources to the same extent as the current generation. This is only possible if the cultural resource is not destroyed or allowed to be excavated in a manner that will irretrievably lose information. The archaeological opulent model will allow archaeologists (or treasure hunters) to excavate sites in such a manner as to disallow future archaeologists, armed with improved excavations techniques and better analytical and scientific equipment, to study the archaeological site. The preservationist model may require all archaeological sites to be preserved *in situ* without any attempt at excavation on the basis that future archaeologists will be able to study and excavate the site in a more scientific and archaeological sound manner. Progress, however, can only occur if archaeologists are allowed to excavate now, and learn from the process. The equity between successive generations of archaeologists may therefore be to excavate only some sites, particularly those sites that are in danger of being destroyed through natural forces.

The principles of conservation of diversity, quality and access should guide the present generation's policies regarding the utilisation of the cultural heritage resource. This includes conservation of information obtained from excavations as well as the sites and artefacts themselves. At a national level, most countries have enacted legislation preserving cultural heritage, though the interests of the future generation are not always explicitly referred to.[74] The duty to conserve the quality of the cultural heritage resource base allows future generations not only to enjoy the cultural heritage, but also to undertake more detailed investigations.[75] New

---

[74]For a reference to national legislation, see Burnham, B., *The Protection of Cultural Property: A Handbook of National Legislation* (1974) The International Council of Museums

[75] For example, article 9 of the *UNESCO Recommendation on International Principles applicable to Archaeological Excavations* 1956 states; "Each member state should consider maintaining untouched, partially or totally, a certain number of archaeological sites of different periods in order that their excavation may benefit from improved techniques and more advanced archaeological knowledge." This has been done, for example, in the case of an excavated structure at the site of Kohunlich in Quintana Roo, Mexico, which is known for its huge stucco masks in its façade. Although three rows of masks have

techniques of dendrochronology, carbon-14 dating and thermoluminescence may tell archaeologists more than they are presently able to deduce.[76] This may only be possible if the quality of artefacts and sites are maintained. Each generation has a duty to ensure that their acts do not irretrievably harm the cultural heritage. This duty may also entail the duty to compensate for any actions that do adversely affect the cultural heritage and to provide for emergency plans to protect UCH under threat.[77]Adverse impacts on UCH may include harbour dredging operations, land reclamation schemes, beam trawling fishing operations, offshore mining operations as well as unnecessary or clandestine excavations of archaeological sites. The duty may also include the setting of standards and procedures to ensure that any operations that may have an effect on the cultural heritage are undertaken in such a way as to minimise any adverse effect.

The current generation may have to limit its own access and use of the cultural heritage to ensure that future generations have an equitable access and use of them. Access to the common heritage of humankind must not only be based on intergenerational equity, but also on intragenerational equity, that is, that all members of the present generation should have access to the cultural resources as the common heritage of humankind. Should the resource be located within a State's boundaries, a minimum level of access for non-nationals needs to be developed, as is implemented under the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations[78] and the World Heritage Convention[79]. Cultural heritage in areas of global commons again must be accessible to all peoples. The Moon Treaty[80], the Geneva Convention on the High Seas[81] and UNCLOS provide for free and equal access to all nations[82]. Equitable use and access also entails ensuring that members of the present generation can

---

been uncovered, the lower fourth row, which is know to exist have not been uncovered, and have been left unexcavated for future generations to excavate with better technology. See Warren *op.cit* p.20. This sentiment also appears in some national legislation, such as that of Albania. Article 10 of the Albanian Decree No. 4874 of 23 September 1971 on the Protection of Cultural Monuments, Historic Monuments and Rare Natural Objects states that certain portions of important archaeological areas should be left undisturbed so that further study can be undertaken with more advanced techniques in the future. Prott and O'Keefe (1984) *op.cit* p.42

[76]McHargue and Roberts stated; "[i]f only modern conservation methods could have been applied to the organic materials found in the first Egyptian pyramids opened by archaeologists. If only the infrared camera people could have been used in the Etruscan tombs. If only pollen analysis had been available at the time of the great Scynthian finds." McHargue ,G. and Roberts, M., *A Field Guide to Conservation Archaeology in North America* (1977) Lippincott, Philadelphia as quoted in Prott and O'Keefe (1984) *op.cit* p.152

[77] For example, the UK Archaeological Diving Unit had planned to move the wreck of the *Resurgam* so that it would not be damaged by beam trawlers licensed to fish in the area.

[78] The 1956 Recommendations state in Article 13; "Each member State on whose territory excavations are to take place should lay down rules governing the conditions to be observed by the excavator, in particular as concerns supervision exercised by the national authorities, the period of the concession, the reasons which may justify its withdrawal, the suspension of work, or it's transfer from the authorised excavator to the national archaeological service". Article 14 states; "The conditions imposed upon a foreign excavator should be those applicable to nationals. Consequently, the deed of concession should omit special stipulations that are not imperative." Article 15 states; "...they might allow qualified individuals or learned bodies, irrespective of nationality, to apply on a equal footing for the concession to excavate."

[79] 1972 UNESCO Convention concerning the Protection of the World Cultural and natural Heritage, 1037 U.N.T.S. 151

[80] Treaty on the Principles Governing the Activities of States in the Exploration and Use of outer Space, Including the Moon and Other Celestial Bodies, 610 U.N.T.S 205

[81] Geneva Convention on the High Seas, 450 U.N.T.S. 11

[82]Weiss *op.cit* p.56

use and access the cultural heritage of humankind which is situated in their own State. In the case where a State has insufficient resources to ensure that the cultural heritage of humankind in that State is preserved, the principle of equal burden sharing, together with the principle of equitable access and use require that other members of the present generation ensure that sufficient funding is made available to satisfy these principles. The duty to ensure equitable use also entails that members of the present generation ensure that its 'poorer' members are able to access the cultural heritage of humankind; not only in terms of gaining access to the cultural heritage in other States, but also in terms of access to the cultural heritage in their own State.

The concept of intergenerational equity grants the present generation the 'right' to benefit from the cultural heritage they have inherited from the previous generation, but limited by the duties outlined above. This ensures that the cultural heritage is passed on to the next generation in no worse state than the present generation received it. The rights of the present generation may only be formulated by considering the corresponding obligations to the future generation, and the rights may be no more than residual rights, which are not proscribed in an international convention. It is precisely the lack of an international convention protecting UCH in international waters which has given the present generation unrestricted rights to the cultural heritage to the detriment of the future generation.

Underwater cultural heritage

The history and development of attributable values in underwater cultural heritage [83]

UCH, as any other form of cultural heritage, embodies a number of attributable values. The development and realisation of these existing values have not, however, progressed along similar lines. As a result, conflicts have occurred as to which values should be regarded as paramount and whether some values are tenable. These conflicts are a result of the emergence of underwater archaeology as a scientific endeavour, and which have led to the need for the creation of a preservation regime that is under consideration in this thesis.

UCH covers a vast amount of material. Rising sea levels have submerged ancient cities, ports, prehistoric cave dwellings and ancient landscapes. Ever since humans have sailed the oceans, vessels have been wrecked and valuable cargoes lost[84]. Originally, the recoveries of these cargoes were undertaken with the aim of re-introducing them into the stream of commerce, using nets, grappling hooks and free divers. The wealth of material lost in shipwrecks initiated research into better methods of recovery. In the

[83] For a more detailed discussion on the history and development of underwater archaeology, see Blott *op.cit*; Del Bianco, H.P., "Underwater Recovery Operations in Offshore Waters: Vying for Rights to treasure" 5 *Boston University International Law Journal* (1987) pp.153-176; Green, J., *Maritime Archaeology: A Technical Handbook* (1990) Academic Press; Throckmorton, P., *The Sea Remembers: Shipwrecks and Archaeology* (1987) Artists House; Bass, G.F., *Archaeology under Water* (1966) Penguin Books; Muckelroy, K., *Archaeology Under Water: An Atlas of the World's Submerged Sites* (1980) McGraw-Hill; Blackman, D.J., *Marine Archaeology* (1973) Butterworths

[84] Estimates of the number of ships lost at sea are staggering. Bascom estimate that as many as three hundred thousand ships has been lost per century. See Bascom, W., *Deep Water, Ancient Ships* (1976) Doubleday, New York p.72

seventeenth century brass diving bells were constructed; in the eighteenth century airtight barrels were used; and in the nineteenth century Augustus Siebe invented the hard-hat diving suit, which revolutionised diving and remained unchanged for over a century. The development of the self-contained underwater breathing apparatus (SCUBA) in 1943 made underwater exploration accessible to all, and turned diving into a sporting pastime. This apparatus allowed archaeologists and sports divers to gain access to shipwrecks. Recent technical advances, such as the use of rebreathers, mixed gas diving and global positioning systems have allowed sports divers to extend the range of diving to new depths, and gain access to a greater number of UCH.

The recovery for lost cargo was initially for the sole purpose of re-introducing the cargo into the stream of commerce. This was particularly so in Northern Europe, where diving technology was employed solely for the purpose of retrieving cargo from known wrecks.[85] These activities were conducted under the regime of traditional salvage law. Interest in shipwrecks for their historic and archaeological value was largely unknown, though some isolated investigations were conducted. For example, in 1446, Leon Battista Alberti searched Lake Nemi in Italy for the remains of two ancient Roman vessels. Similarly, in the mid-1800's divers began searching Swiss lakes for Bronze age relics and evidence of lakeshore dwellings.

In the Mediterranean, diving technology was not only utilised to recover cargo from known shipwrecks, but also used to harvest underwater resources such as sponges. Such activity brought divers into contact with unexpected finds. From about 1800, Greek sponge divers and fisherman began to recover UCH of considerable antiquity, including some of the finest examples of classical bronze statutes from the Mediterranean[86]. Mediterranean States such as Greece, Turkey and Italy had considerable ancient cultural heritage on land and experience with activities directed at this cultural heritage, including looting. They therefore began to apply similar legislative and administrative provisions to the recovery of UCH as they did to land. Thus, a legal regime based on considerations other than the economic value of the recoveries began to emerge in the Mediterranean.

These finds of ancient material in the Mediterranean were, however, sporadic and, although of archaeological and historical interest, did not give rise to any systematic investigation into UCH. During these developments, interest in items other than antiquities or cargo began to develop. The systematic study of ancient boats, rather than their cargoes, began with the publication in 1865 of the find of the Nydam wreck by Conrad Engelhardt.[87]. In 1955, the first underwater archaeological[88] conference was held in Cannes, France, and at which one of the major problems with excavation was identified: the archaeologists did not dive, but tended to supervise diving operations

---

[85] Maarlveld, T.J., "Archaeological heritage management in Dutch waters: exploratory studies – cultural and legislative perspectives" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO p.209

[86] For example, in 1812, the 5th century 'Piombino Apollo' was netted by fisherman and later sponge divers recovered the Antikythera Youth and the head of a bearded philosopher. See Bass, G. F., "Marine Archaeology: A Misunderstood Science" 2 *Ocean Yearbook* (1980) p.141

[87] McGrail, S., *Aspects of Maritime Archaeology and Ethography* (1982) Published by the Trustees of the National Maritime Museum (UK) p.11

[88] The term' underwater archaeology' is used here in a generic context, to include the study of any of the subject matter referred to under similar terms, such as nautical archaeology, naval archaeology, maritime archaeology, marine archaeology, archaeology of water transport and archaeology of the boat. For a more detailed discussion on the terminology, see McGrail *op.cit* pp.11-13 and Watters, D.R., "Terms and Concepts Related to Marine Archaeology" 1 *Oceanus* (1985) pp.13-17

from the surface.[89] This observation had been made by the Italian Government archaeologist, Nino Lamboglia, who had overseen the recovery of a 1st century BC Roman merchant vessel off Albenga, Italy, by a salvage company. The divers had damaged the amphorae during the recovery and had made little attempt to preserve or record the artefacts' contextual relationships. Arguably the most important step in the development of underwater archaeology was in 1960 when George Bass became the first archaeologist to learn how to dive and, in co-operation with Peter Throckmorton, began the excavation of a thirty-one century old vessel off Cape Geladonya, Turkey[90]. Underwater archaeology, as a scientific discipline, had emerged in the Mediterranean. With its emergence, came the recognition of a sharp division between archaeology and salvage.[91]

In Northern Europe, Scandinavia and the remaining parts of the globe that derived their legal structure from these areas, the recovery of cargo continued to be conducted under the regime of salvage law. With the developments in the Mediterranean, archaeological interest began to emerge and the search for specific wrecks was not always undertaken for commercial reasons. However, without the benefit of a history of antiquarianism, as existed in States such as Greece and Italy, salvage law persisted as the applicable regime. The distinction between the recovery of a cargo for commercial purposes and for archaeological purposes was not always easily distinguishable, and so developed the conflict between the realisation of these values in UCH.

Underwater archaeology as a science

The general aim of the science of archaeology is to construct a picture of past cultures and societies and their way of life through the interpretation of scientifically gathered evidence[92]. The relationship between the archaeological material and the culture that manufactured it can only be accurately determined through the application of scientific theory and techniques. These techniques include *inter alia*, survey, sampling, excavation, preservation and reconstruction. The uses of other scientific disciplines to aid archaeological interpretation are invaluable, such as paleobotany, dendrochronology, isotope analysis, thermoluminescence and carbon dating.

"The term 'underwater', when applied to archaeology, describes an environmentally-imposed technique rather than a subject in its own right".[93] However, UCH and underwater archaeology differ to terrestrial cultural heritage and archaeology in a number of ways. Firstly, due the marine environment, UCH are often very well preserved, though extremely fragile, requiring long, expensive and complex

---

[89] Green *op.cit*

[90] For a detailed description of the stages of development of underwater archaeology as a science, see Bass *op.cit* pp. 137-152. For a description of the development of underwater archaeology in the US, see Cockrell, W.A., " A preservationists overview of the legal and ethical controversy surrounding treasure hunting" in Watts, G.P.(ed.), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference in Underwater Archaeology* (1981) Fathom Eight pp.317-318

[91] Maarlveld *op.cit* p.209

[92] For an overview of contemporary issues in maritime archaeology, see Babits, L.E. and Van Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press

[93] Martin, C., "Archaeology in an Underwater Environment" in Anon., *Protection of the Underwater Cultural heritage: Technical Handbook for Museums and Monuments* (1981) UNESCO Publishing p.19

conservation techniques[94]. Secondly, in the case of shipwrecks, the wreck and its contents can be considered as a 'time-capsule' to the extent that, at the time of sinking, the wreck captures a point in time in history. All the artefacts will have the same time reference, improving their contextual interpretation. Preservation *in situ* and the integrity of an UCH collection are therefore paramount concerns in preserving archaeological evidence. Thus, of all the competing values inherent in cultural heritage, the archaeological and historical evidence derived therefrom should take preference to all other values. This, however, is not to say that the others should be ignored. A scientifically excavated complete collection will not only preserve the archaeological evidence, but may be of aesthetic value, economic value and a powerfully emotive representation of a particular culture. Thirdly, the nature of the marine environment entails the use of different techniques and tools than those used in terrestrial archaeology. For excavation on the deep seabed, the techniques and tools are also vastly different from those used in shallow waters. For example, in the late 1980's, the first complete deep-water archaeological excavation of an historic shipwreck was undertaken with the use of remotely operated vehicles (ROV)[95]. The equipment needed for such an excavation is extremely complex and expensive, derived from commercial activities such as oil exploration, and is often well beyond the means of State governments, particularly developing States[96]. Fourthly, underwater archaeology is a relatively new scientific discipline, and has yet to be recognised as being on par with territorial archaeology by some sectors of the scientific community[97]. In 1978, a report for the Council of Europe stated that;

"One of the most significant, but underlying reasons for the difficulties in securing protection for the underwater cultural heritage and its proper excavation, is the lack of recognition in most academic circles of underwater archaeology as a valid scientific discipline."[98]

Underwater archaeology is therefore still struggling to determine the techniques, theories and even its justification as a scientific discipline.[99] This naturally has an effect on the way in which the values it strives to achieve are viewed by other interest groups.

The values of the underwater cultural heritage

Many items recovered from the oceans and lakes are undoubtedly of archaeological importance. For example, for many years the bronze age artefacts recovered from the Swiss lakes in the mid-1800's were the only source of information on Bronze Age industry.[100] These objects may, however, have other uses. For example, they may provide entertainment for those interested in the past, or in the adventure and technical

---

[94] Jenssen, V., "Continuing involvement of Governments: the problem of conservation" in Langley, S.B., and Unger, R,W., *Nautical Archaeology: Progress and Public Responsibility* (1984) BAR International Series p.48

[95] The wreck of a 1622 Spanish Caravel, lying in 1300 ft of water, was undertaken in international waters off the coast of Florida. Over 17000 artefacts were mapped and recovered using manipulators from the ROV 'Merlin'. Pickford, N., *The Atlas of Ship Wrecks and Treasure* (1994) Dorling-Kindersley p.54

[96] See Delgado, J.P., "Lure of the Deep" *Archaeology* (May/June 1996) p.43

[97] See Broadwater, J.D., "Nautical Archaeology: Coming of Age but Facing an Identity Crisis" in Watts G.P. (ed.), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference of Underwater Archaeology* (1981) Fathom Eight pp.218-224

[98] Doc. 4200-E, Strasbourg, 1978 p.7

[99] For a good discussion on the justification of underwater archaeology, see Broadwater *op.cit* pp. 218. See also Gifford, J. Redknapp, M. and Fleming, N., "UNESCO International Survey of Underwater Cultural Heritage" 16 *World Archaeology* (1985) pp.373-376

[100] Blott *op.cit* p.24.

expertise needed to recover objects from such depths; they may provide a sanctuary for sea life of interest to biologists; they may provide a breeding or gathering ground for fish stock which may be harvested or they may in fact be a hindrance to those who wish to utilise the seabed beneath the objects[101]. Recovered artefacts may also have a high economic value, both intrinsic and attributed. For example, the artefacts recovered from the *Neustra Señora de Atocha* are reputed to be worth over US$250 million.[102]

The UCH may also have aesthetic and expressive value, from both a national and universal perspective, requiring protection and preservation. Seafaring, by its very nature, often involves international travel, where vessel from one State or nation may pick up cargoes, passengers and even crew from different States during its voyage. The complex remains of a shipwreck may therefore contain artefacts from a number of States or nations, yet the story and archaeological and historical information it can yield is distinctly international. In the case of ancient vessels, it is extremely difficult to determine the origin or either the vessel or some of its cargo. Bass notes that, in the case of the thirty-one century old Cape Geladonya wreck site, scholars cannot agree on the origin of the wreck or its cargo, "some holding that it is Syrian, other that it is Greek, and still other that it is either Cypriot or of mixed nationality."[103] Whilst these vessel may flounder in international waters, they are more often that not wrecked on a coast, which might be of a State with no cultural connection with the vessel at all. The possible claims of the coastal State will further confuse matters in cases of return or restitution.

The history of the development of underwater archaeology evinces a continual change in the perceived values of UCH. Underwater archaeology's emerging scientific status has brought new impetus to this shift in attributable values and resulted in a conflict between groups with divergent perceptions of the values attributable to UCH. While some States have already resolved this conflict, many have not, and there is yet no regime to address this issue in international waters. There are many users of UCH in international waters who recognise different values in UCH. The UNESCO draft convention is essentially an attempt to achieve a balance of values attributable to UCH. It is thus instructive to consider the values and perceptions of the different user groups of UCH in international waters.

The interest groups in underwater cultural heritage

The current users of UCH include archaeologists[104], treasure salvors, sport divers and other sea-users, such as fisherman and the construction industry. While the archaeological community, treasure salvors and sports divers have a direct interest in UCH, other sea-users have an indirect interest.

---

[101] For a discussion of the various uses of historic wreck, and the possible values that could be attached to each use, see Kaoru, Y & Hoagland, P "The Value of Historic Shipwrecks: Conflict and Management" 22 *Coastal management* (1994) pp.195-213

[102] Stevens, T.T., "The Abandoned Shipwreck Act of 1987: Finding the proper ballast for States" 37(3) *Villanova law Review* (1992) p. 585 fn.42. See also Velocci, T., "Treasure Hunting: There's gold in them thar Galleons" *National Business* (August 1980) pp.58-62. Other extremely value recoveries include gold bullion recovered from the wreck of the *SS Central America*, sunk in 1857 worth $2 million. See Delgado *op.cit* p.43

[103] Bass *op.cit* p.151

[104] For an historical account of the development of professional archaeology, and its separation from amateur archaeology and treasure hunting, see Carman *op.cit* pp.80-85

UCH often provide a feeding or breeding ground for fish stocks, attracting fisherman that use a variety of techniques and equipment that can damage UCH. One of the main sources of information regarding the location of UCH, particularly shipwrecks, is from net fastenings recorded by fisherman. The damage caused by these fisherman is, however, ordinarily inadvertent, and in many cases would not be in the fisherman's interest to damage or destroy UCH. Often, however, the use of certain fishing methods, such as bottom beam trawlers, will obliterate any UCH without the fisherman necessarily being aware of the consequences of their activities[105].

For convenience, the term construction industry refers to any industry which involves the alteration of the physical environment in which UCH may be found, such as land reclamation schemes, harbour dredging, port construction, offshore oil and gas drilling, laying of pipelines, deep seabed mining and the construction of artificial islands. In some cases, the construction industry is required to report the discovery of any UCH and ensure its preservation.[106] However, in many cases, the construction industry either prefers not to report such finds, lest they interfere with the development, or are simply unaware of the existence and damage to the UCH.[107]

State governments and international organisation, such as UNESCO also have an interest in this resource. State government may have an interest in protecting evidence of their national culture, while UNESCO and other international and non-governmental organisation have a universal cultural preservation perspective, and aim to preserve evidence of the cultures of all nations as they make up the common heritage of humankind.

As far as the direct users of UCH are concerned, the generalised view is that "archaeologists value shipwrecks as a means to study past cultures, sports divers value shipwrecks for their potential as recreational sites and treasure salvors value shipwrecks for economic profit"[108]. It is these different attributable values which are perceived by many user groups as conflicting and, at times, mutually exclusive. In the US, the negotiations leading up to the enactment of the Abandoned Shipwreck Act revealed the

---

[105] Reports of damage to UCH from fishing nets and bean trawling are numerous. Some examples include damage to the *Stirling Castle* in the Goodwin Sands, UK and the *Vliegend Hart*, a VOC ship sunk off Holland.

[106]For example, Norwegian legislation requires offshore developers to report any discovery of UCH. Similarly, the International Seabed Authority (Hereafter "ISBA") has produced a set of Draft regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, which requires that "a prospector shall immediately notify the Secretary-General in writing of any finding in the Area of an object of an archaeological or historical nature in its location." (Regulation 8).

[107]For a good description of the damage caused to UCH in the ports of Cadiz, Lisbon and Cartegena, see Marx, R., "The Disappearing Underwater Heritage" 35 *Museum* (1983) pp.9-10. For example, in Cadiz Spain, within a three-kilometre radius of the modern port, fifty-four classical period shipwrecks and ninety-seven of latter date were recorded from 1960-1962. By 1983 it was estimated that more than two-thirds had been totally obliterated by dredging operations. Similarly, dredging operations in the Portuguese port of Sines destroyed four Punic age shipwrecks, while in Portimão dredging operation destroyed one Punic and two Roman shipwrecks. In Lisbon, where at least 500 ships are known to have sunk, the captain of a dredging boat has stated that "rarely a day passes in which some vestiges of an old shipwreck are not seen spewing out of the discharge end of the dredge pipes."

[108] Giesecke, A.G., *Historic shipwreck resources and state law: a development perspective* (1992) Unpublished PhD Thesis, Catholic University of America p.3; Also see Roach., J.A., "Shipwrecks: Reconciling Salvage and Underwater Archaeology" paper presented at the Proceedings of the Thirty First Annual Law of the Sea Institute, University of Miami, 30-31 March 1998 p.8

variety of stances on the issues. In reporting on these negotiations, Herscher commented;

"The opponents arguments took several different forms. Some cast the issues as a political one arguing for public and entrepreneurial freedom from government regulation and restriction. Others contended the present system organised around admiralty law is in fact working effectively for preservation, and that claims to the contrary are the 'big lie'. Finally there are the pragmatic - though rather cynical - approach, predicting that any regulation would merely serve to create a black market and increase clandestine dismantling of underwater sites. The two sides describe the problem in revealingly different ways. Supports consider the question to be preservation versus destruction, while opponents say that it is preservation versus utilisation."[109]

Many in the archaeological community have suggested that treasure salvors are a major threat to UCH and should be eliminated as a user group[110]. Treasure salvors, however, maintain that as a user of this resource, they have less impact than any other user. This is primarily due to the fact that in international waters, a number of factors exist that significantly affect the number of UCH sites, particularly wrecks, which are viable for commercial excavation, such as depth, high costs of technology, and the low percentage of wrecks which carried cargo of high economic value. One commercial treasure salvage company estimates that there are at most 20 or 30 shipwrecks that are economically viable to excavate.[111]

The nature of the conflict between the user groups

Although it is beyond the scope of this work to fully discuss the arguments articulated by the different interest groups, a brief discussion of the main points of contention is appropriate.[112] The precise nature of the perceived conflict between the treasure salvage

---

[109] Herscher. E., "Hearings held on Historic Shipwreck Legislation" 11 *Journal of Field Archaeology* (1984) p.79

[110] Clément, E., "Current developments at UNESCO concerning the protection of the underwater cultural heritage" 20(4) *Marine Policy* (1996) p.309; Williams, S., "Underwater Heritage, A Treasure Trove to Protect" 87 *UNESCO Sources* (1998) p.7; Elia, R.J., "US Protection of underwater cultural heritage beyond the territorial sea: problems and prospects" 29 (1) *International Journal of Nautical Archaeology* (2000) pp.43-56

[111] Stemm. G., "Protection of out Underwater Cultural heritage: Thoughts on the Future of Historic Shipwrecks" paper presented at the Thirty First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998 p.7: Other estimates put the number of economically viable wrecks as approximately 100 to 200, which would yield a salvage value of more than US$10 million. CLT-96/CONF.605/6, Paris, 22-24 May 1996 p.12.

[112] For a more detailed discussed of the arguments for/ against commercial recovery of historic wreck, see Sweeney. J.P., "The American Law of Treasure Salvage" and Varmer, O., "Should there be such a thing as Treasure Salvage" papers presented at the 1998 Maritime Law Symposium: Sunken Treasure: Law, Technology and Ethics. Roger Williams University, Bristol, Rhode Island 13 - 15 August 1998; See also, Cockrell. W.A., "The trouble with treasure - a preservationist view of the controversy" 45 *American Antiquity* (1980) pp.333 - 339; Cockrell (1981) *op.cit* p.311-320; Stemm (1998) *op.cit* p.7; Brice, G., "Salvage and the underwater cultural heritage" 20 *Marine Policy* (1996) pp.337 - 342; Clement *op.cit* pp.309-323; Roach *op.cit.* pp.1-12; Miller. G.L., "The Second Destruction of the *Geldermalsen*" in Prott, L.V. and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO pp.94-101; Elia, R.J., "The Ethics of Collaboration: Archaeologists and the Wydah Project" 26(4) *Historical Archaeology* (1992) pp.105-117; Hutchinson, G., "Threats to underwater cultural heritage. The problem of unprotected archaeological and historical sites, wrecks and objects found at sea" 20(4) *Marine Policy* (1996) pp. 287-290; King, T.F., "Losers, Weepers: The Great Historic Shipwreck Debate" paper presented at the National Trust for Historic Preservation Conference, US, 7 October 1992; Cockrell, W.A., "Why Dr. Bass Couldn't Convince Mr. Grumbel: The Trouble with Treasure Revisited. Again", Duncan Mathewson III, R., "Archaeology on Trial" and Throckmorton, P., "The Worlds Worst Investment: The Economics of Treasure Hunting with real-Life Comparisons" in Babits, L.E. and Van

community and the archaeological community is difficult to ascertain, and characterised by generalisation made by both interest groups. The 'purist' sector of the archaeological community regard the realisation of the UCH's archaeological value as being incompatible, and mutually exclusive, from the realisation of its economic value. Elia, for example, declares that these interest groups have "fundamentally opposed core values, goals, methods and interests"[113] and that "commercial salvage operations are fundamentally at odds with preservation."[114]

Others, however, perceive the conflict as being characterised by the nature of the activities undertaken by treasure salvors in order to obtain a profit rather than by any opposition to the policy of making a profit from the recovery of UCH. As such, opposition to the commercial recovery of UCH is directed at the excavation methodology. The archaeological community has argued that commercial recovery operations necessitate cost effective recovery methods, which are not time consuming. This is at variance with the time consuming and detailed excavation techniques necessary to reap the full archaeological value from UCH. It is therefore argued that a salvage operation will entail the recover of the artefacts with the highest commercial value first, possibly to the detriment of less valuable cultural heritage items.[115] O'Keefe[116], for example, states that "excavating to archaeological standards in most cases will mean that there is no profit even if all the materials are sold."[117] Salvors have therefore been described as those "whose interest is solely in the recovery of commercially valuable material, without regard to the proper methodology of archaeological excavation."[118] The archaeological community have pointed to examples of commercial recovery operations such as that of the Dutch-East Indiaman, the *Geldermalsen,* as illustrating the manner in which valuable archaeological and historical information has been lost whilst the economic value of the wreck is maximised.[119]

Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press pp.75-104; Atkinson, K., "Private Enterprise in Maritime Archaeology" II *Bulletin of the Australian Institute of Maritime Archaeology* (1987) p.19; Abbass, D.K., "A Marine Archaeologists looks at treasure salvage" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.261-268

[113] Elia *op.cit* p.46

[114] *Ibid*, P. 49

[115] Doc. 28C/39 Paris, October 1995 para.30; See also Stevens *op.cit* p. 577

[116] O'Keefe, for example, not only regards the archaeological treatment of the *SS Central America* as rather suspect, but also is opposed to the very recovery of the artefacts from the wreck. He suggests that modern archaeological practise advocates preservation of historic and archaeological shipwreck *in situ.* A historically important wreck such as the *SS Central America* should therefore only be recovered if the site is in danger of destruction or an excavation of the site would answer a scientific question. As neither was apparent in this case, O'Keefe concluded that the primary reason for excavation was the recovery of the gold. (O'Keefe, P.J., "Gold, Abandonment and Salvage" 1 *Lloyd's Maritime and Commercial Law Quarterly* (1994) p.11. For further discussion on the *SS Central America*, see King, M., "Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters" 31 *Harvard International Law Journal* (1990) pp.313–321). Similarly Stevens suggests that salvage law is unsuitable in these cases as "the focus of admiralty law traditionally has been commercial, not cultural resource management or recreation."(Stevens *op.cit* p.580).

[117] O'Keefe, P.J., "Protecting the underwater cultural heritage: The International Law Association Draft Convention" 20(4) *Marine Policy* (1996) p.303

[118] Clement *op.cit* pp.309-323

[119] For a criticism of the recovery of an historic shipwreck, the *Geldermalsen*, by treasure salvors, see Miller *op.cit* pp.94-101. See also Hutchinson *op.cit* pp. 287-290. Many in the archaeological community have suggested that because of the lack of appropriate excavation methodology by the treasure salvage community, they are a major threat to the archaeological value that could be gained from UCH, and should be eliminated as a user group (Clément *op.cit* pp.309-323). This, it is argued, is primarily a result of the application of traditional salvage law to UCH. This is undoubtedly true of a number of treasure salvage excavations. For example, in 1994 a commercial salvage company recovered the wrecks of the *Albion*, grounded in 1765, and *Hindustan*, grounded in 1803, using mechanical grabs designed to retrieve

Salvors, however, have responded by declaring that "it is in the salvor's best interest to record all.... data, both to enhance the historical value of a piece and to enhance an artefacts value for purposes of sale."[120] The primary concern of the archaeological community is the fact that these commercial operations have not adhered to appropriate scientific standards of underwater archaeology. Whilst such standards may be imposed by coastal State in waters under their jurisdiction, no such standards exists with regard to UCH in international waters. In 1995, a UNESCO feasibility study outlined these

---

scrap metal as fast and efficiently as possible. The mechanical grabs brought up ribs, planks and decks, some of which were broken by the jaws of the grab. Also recovered were iron guns, ship's barometers, surgical equipment, drug jars and an assortment of other cultural items. These were left at the Custom's warehouse in Ramsgate while the Receiver of Wreck sought the owner. As none was found after a year, these items were returned to the salvage company, who subsequently put them up for auction. (Anon "All at Sea and Undefended" *British Archaeology News* (1994) pp.6–7). Similarly, the 18th century British Frigate *DeBraak* was recovered off the coast of Delaware, USA, during the 1980's using cables to reel in the remains of the vessel, which scattered valuable artefacts into the Delaware River. Clamshell buckets had been used to scoop up artefacts that remained.(Stevens *op.cit* p.577). In 1978, the National Oceanic and Atmospheric Administration published the location of the wreck of the US Civil War wreck, the *New Jersey*. The vessel contained a valuable cargo of glassware, ceramics and music boxes. Since 1982, however, repeated assaults on the wreck by souvenir hunters have rendered the shipwreck a total loss to both recreational sport divers and archaeologists. Similarly, the wreck of the *China*, off the coast of Delaware, has been looted to such an extent that it is no longer of any archaeological or historic importance (Stevens *op.cit* p.614). A maritime tragedy is the loss of the wreck of the *San Jose* in Florida waters to unscrupulous treasure salvors. The *San Jose* was one of a number of vessels from the 1733 Spanish Plate Fleet lost of the middle Florida Keys. The *San Jose,* which was "to have been the world's first underwater shipwreck park, is now simply a hole in the ocean floor, with even the ballast stones removed for a fireplace, the few surviving timbers made into a coffee table, the marvellous toy miniature clay animals made by Mexican Indians smashed to bits, and the coins worn around investor's necks."(Testimony by Wilbur Cockrell, Underwater Archaeologist for the State of Florida before the Committee on Oceanography, July 15 1982, reprinted in 10 *Journal of Field Archaeology* (1983) p.112). In Texas, the wreck of the *Espiritu Santo* (1554) suffered the same fate as the Florida wreck, the *San Jose*. Not only was there no actual archaeological standards observed in the recovery of artefacts from this wreck, but on reaching the surface many artefacts were needlessly destroyed by the salvors using hammers to brake off the concretion surrounding the artefacts. Wood and other organic material were left to dry out and crumble. The treatment of the *Espritu Santo* has been used in comparison to the treatment of the *San Estaban* to highlight the possible disparity between archaeological recovery and treasure salvage. The *San Estaban* was another vessel wrecked in 1554 from the Spanish Fleet. The *San Estaban* was excavated in 1973 with sponsorship from the Texas State Antiquities Committee. A detailed site map was made and accurate positions recorded before artefacts, including silver coins, bullion, and gold ornaments were recovered., which subsequently underwent long and extensive preservation. Little was know of the construction of these Spanish vessels, and the recovery of the ships keel provided important information, which was made available to the public through a series of publications. Movies of the recovery were shown on television, artefacts displayed in museums, publications distributed and a travelling exhibition circulated to schools in Texas. It is estimated that the cost of these processes far exceeded the value of the artefacts that could be recovered from the sale of any of the artefacts. (Herscher *op.cit* pp.84–84. For a more detailed discussion on Florida's environmental protection programme, see Paull IV, J., "Salvaging sunken shipwrecks: whose treasure is it? A look at the competing interests for Florida's underwater riches" 9(2) *Journal of Land Use and Environmental Law* (1994) pp. 359 – 365). The unscrupulous activities of salvors in the South China seas has also lead to the irretrievable loss of information form the wreck of the *Geldermalsen* and a Chinese wreck of the Song Dynasty (A.D. 960 – 1368). In these cases, the salvors used dynamite to destroy the last traces of the wreck after salvage operations were completed in order to ensure that the Chinese government, on whose CS the wrecks lay, would not be able to identify the locations of the wreck. (Zhao, H., "Recent Developments in the Legal Protection of Historic Shipwrecks in China" 23 *Ocean Development and International Law* (1992) p. 319). These are only a few examples of UCH which have been destroyed and yielded little of the archaeological value they had contained. Many more examples exists. These cases have often been used as examples of the inappropriateness of salvage law to the recovery of historic wreck. (For further discussion on the damage caused to UCH during some commercial operations, see Cockrell *op.cit* p.311-320

[120] *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 525 F.Supp 186, 218 (S.D.Fla. 1981)

lack of standards as requiring urgent action at an international level in order to preserve the archaeological value that could be realised from UCH.[121]

The salvage company has, as its primary objective, the making of a profit. In some cases, this will only be possible if the company is able to obtain ownership of the recovered artefacts, which it is then able to sell. Although the archaeological community would appear to have the moral advantage in the reasons for denying private ownership and the sale of UCH, the achievement of economic profits and private enterprise are no less applauded in certain sectors of society. However, some sectors of the archaeological community have argued that artefacts recovered from historic wreck should never be sold[122], and should not belong in private collections[123]. It has therefore been the policy of many of the archaeological societies to oppose the commercial recovery of historic shipwrecks[124]. The attitude of the archaeological community is best expressed by the editor of the *Encyclopaedia of Underwater and Maritime Archaeology*[125] in a footnote to the inclusion of a section on the recovery of the wreck of the *Neustra Señora de Atocha*;

"This site is included because it is well known and widely reported in the popular media and press. However, sites such as this have primarily been the focus of commercial orientated activity that has often resulted in the sale of recovered artefacts to private owners, the transfer of artefacts to private investors, or the splitting of artefacts between a government and a private salvor. Despite the presence of an archaeologist on the site, or the recovery of any archaeological data, the long-term potential of a site to yield meaningful information is compromised when the collection of artefacts – the primary data of an archaeological site – has been dispersed. Furthermore, the sale of artefacts from the shipwreck site endorses the concept that the archaeological past and antiquities are commodities for sale on the open market, which has proved detrimental to the protection and study of the past. The inclusion of this site in this encyclopaedia does not sanction or condone this type of activity.

While opposed to the sale and dispersal of a collection, some archaeologists do not appear to oppose the commercial use of the archaeological resource *per se*. Green for example, states that "[i]t is the profit motive, which leads in turn to the sale of artefacts, that is the problem.... However, should the treasure hunters consider carrying out careful excavation in order to keep their collections together, conserved in proper environmental conditions, in a museum so that they may profit from the admissions and bookshop sales, then the story would be quite different."[126] Thus it appears that the profit motive may not necessarily be the principle opposed by some archaeologist, only the manner in which the profit is achieved. Similarly, King recognises that "treasure salvors make more money through the sale of shares in their enterprises, and from the sale of movie and television rights, than they ever do from the sale of treasure itself". He thus proposed that commercial recovery of UCH could be viable if regulated and does not result in the splitting up of collections.[127] The application of inappropriate recovery

---

[121] Doc.146 EX/27, Paris, 23 March 1995

[122] For example, artefacts from the historically important wreck, the *HMS Invincible* was sold on auction in the UK. It was only at the discretion of the salvor that a representative sample of the artefacts was sold by private agreement with the Chatham Historic Dockyard Trust. See Dromgoole, S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom* (1993) Unpublished PhD Thesis, University of Southampton p.2-17

[123] Johnstone, P.F., "Is it Treasure or a Worthless Piece of Ship?" 26(4) *Historical Archaeology* (1992) pp.118-123

[124] Elia *op.cit* pp.112-114

[125] Delgado, J.P., *The Encyclopaedia of Underwater and Maritime Archaeology* (1997) British Museum Press p. 298.

[126] Green *op.cit* p.258

[127] King, T.F., "Why the State of Maryland should permit the commercial salvage of submerged historic properties" A report to governor William Donald Shaefer's advisory committee on maritime archaeology (1987) p.2

techniques is often regarded as a consequence of the application of traditional salvage law to UCH. For example, Paull argues that "salvage destroys archaeological resources before proper documentation and restoration can occur."[128] Similarly, Clement states that "[a]s the vessel they are working on is 'in peril of the sea', it is appropriate salvage practise to recover the objects of highest commercial value first, so that, if the wreck is ultimately lost before all salvageable materials have been recovered, the value of the loss is minimised"[129], and that the "[a]pplication of the law of salvage which encourages the removal of artefacts from the seabed for commercial purposes, may therefore lead to possible damage to and possible destruction of the underwater cultural heritage."[130] Salvage law is not, however, without its advocates. Brice, for example, states that "were salvage never to apply to underwater cultural heritage then the responsible professional salvor would be driven from the scene and the piratical adventurer encouraged."[131]

In trying to identify the main points of contention, it is useful to distinguish between the opposition to the application of salvage law to the recovery of UCH, and the opposition to the economic utilisation of UCH irrespective of the legal regime which governs its recovery. These will be dealt with in turn.

Salvage law and underwater cultural heritage [132]

Introduction

The traditional international legal regime that has been applied to the recovery of UCH in international waters has been salvage law[133], which allows the salvor to maximise the economic value of the UCH to the detriment of the realisation of its archaeological

---

[128] Paull IV *op.cit* p.368; The application of salvage law to UCH is also criticised in Johnston, P.F., "Treasure salvage, archaeological ethics and maritime museums" 22(1) *International Journal of Nautical Archaeology* (1993) pp.53-60: Elia (1992) *op.cit* pp.105-117; Elia (2000) *op.cit* pp.43-56; Delgado *op.cit* p.93, Nafziger, J.A.R., "Historic Salvage Law Revisited" 31 *Ocean Development and International Law* (2000) pp.81-96

[129] Clement , E., "Development of an international convention on the protection of the underwater cultural heritage" *Proceedings of the Thirty First Annual Law of the Sea Institute*, 30 March 1998, University of Miami, Florida; Roach *op.cit.* p.10

[130] Clement *op.cit.* p.11. Such a statement presumes the application of salvage law on the premise that the wreck is in marine peril necessarily results in traditional salvage practise being applied. This is not necessarily true, as the utilisation of the legal fiction of marine peril is simply a tool utilised to obtain control over the recovery of the wreck and does not always result in traditional salvage practises being applied. It is, however, true that these are more often than not the consequence of commercial salvage in the past. This does not necessarily apply to the future though.

[131] Brice (1996) *op.cit* p.342

[132] See Melikan, R., " Shippers, Salvors and Sovereigns: Competing Interests in the Medieval Law of Shipwreck" 11(2) *Journal of Legal History* (1990) pp.163–181; Brice, G., *Maritime Law of Salvage* 3rd ed (1999) Sweet & Maxwell p.4-03; See Cerise, C.A., "Treasure Salvage: The Admiralty Court 'Finds' Old Law" 28 *Loyola Law Review* (1982) p.1127;

[133] The application of salvage law to the recovery of UCH, particularly in the US, has been the topic of a number of articles over a number of years, including: Fee, F.H., "Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters" 21 *University of Florida Law Review* (1969) pp.360–375; Lawrence, A., "State Antiquity Laws and Admiralty Salvage Protecting Our Cultural Heritage" 32 *Miami Law Review* (1977) pp.291-338; Koenig, R. A., "Rights in recovered sea treasure. The salvors perspective" 3 *New York Journal of International Law and Commerce* (1982) pp.271-305; Owen, D. R., "Some legal troubles with Treasure: Jurisdiction and Salvage" 16(2) *Journal of Maritime Law and Commerce* (1985) pp.139-179; Owen, D.R, "The Abandoned Shipwreck Act of 1987. Goodbye to Salvage in the Territorial Sea" 19 *Journal of Maritime Law and Commerce* (1988) pp.499-516; McLaughlin, S.L., "Roots, Relics and Recovery: What went wrong with the Abandoned Shipwreck Act of 1987" 19 *Columbia-VLA Journal of Law and the Arts* (1995) pp.149–198; Paull IV *op.cit* pp.347-373

value.[134] As such, the introduction of appropriate standards of underwater archaeological practise has been regarded as requiring the elimination of salvage law as the applicable legal regime for the recovery of UCH.

Salvage may be defined as[135] "the compensation allowed to persons by whose voluntary assistance, a ship at sea or her cargo, or both have been saved in whole or in part from impending sea peril; or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture."[136] The policies that form the foundation of salvage law are to encourage individuals to voluntarily save lives and property at sea and to return such saved property to its owner for reintroduction into the stream of commerce. Before salvage law may be applied, three criteria must be satisfied[137]; (a) property in marine peril on navigable waters; (b) voluntary efforts to rescue the property; (c) partial or total success; and (d) conducted *bona fide* in the interest of the owners. Once these three criteria are satisfied, the court will grant a salvage award, which will be assessed by taking into account a number of factors[138]. The criteria for a salvage award have been internationally agreed upon, and include, *inter alia*, consideration of the value of the property salvaged, the skill and value of the equipment used by the salvor, the nature and degree of marine peril which existed at the time of the salvage operation and the measure of success achieved.[139] Following a successful salvage, the salvor has an action *in personam* against the owner of the salved property. However, in order to secure the salvage award, the salvor is granted a maritime lien over the salved property[140]. Where

---

[134] Doc.146 EX/27, Paris, 23 March paras.7-10

[135] Brice states that "in English law a right to salvage arises when a person, acting as a volunteer preserves or contributes to preserving at sea any vessel, cargo or freight or other recognised subject of salvage from danger." Brice *op.cit* p.1

[136] Norris, M.J., *The Law of Salvage* (1958) p.157. In this sense, salvage refers to the actual award, but it may also be used to describe the type of work undertaken in order to achieve this award.

[137] *Blackwall*, 77 U.S (10 Wall 1 19L Ed. 870 (1869)); *The Sabine* 101 U.S 384 (1880)

[138] For example, in the case of the recovery of an historic wreck, the court in *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 549 F.Supp. 540, 557 (S.D.Fla. 1982), took into account the following six factors; (a) the labour expended by the salvors in rendering the salvage service; (b) the promptitude, skill and energy displayed in rendering the service and saving the property; (c)the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed; (d) the risk incurred by the salvors in securing the property from the impending peril; (e) the value of the property saved; and (f) the degree of danger from which the property was rescued."

[139] Article 13 of the 1989 London Salvage Convention (LEG/CONF.7/27, May 2, 1989), headed 'Criteria for fixing the reward', states that; "1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below: (a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimising damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of the danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.

[140] The maritime lien is a substantive right and is not dependent on possession. See Dromgoole, S., and Gaskell, N., "Who has a right to historic wrecks and wreckage?" 2(2) *International Journal of Cultural Property* (1993) p.246). So, for example, property in the possession of a museum for conservation purposes will still be the subject of the salvors maritime lien. At no time, however, does the salvor obtain title to the artefacts. A salvor may have exclusive possession, as opposed to ownership, if the vessel is derelict, and can only lose this possession in the case of manifest incompetence. (*Crossman v West* (1887) 13 App. Cas. 160). A salvor may not necessarily take possession of the salved property. This occurs when the master of a vessel remains in possession of the vessel, but requires the aid of salvors, who will subsequently obtain a maritime lien over the salved property. For obvious reasons, this will not occur in the case of UCH and the salvor will ordinarily obtain a possessory right to the salvaged artefacts and to exclusive access to the wreck or wreck site.

the owner of the salved property is not known, the salvor can take action against the salved property itself in an *in rem* action[141]. In the case of UCH, the ability of a salvor to take action against the wreck itself is vitally important, as in most cases the vessels will have been lost for a considerable period of time, and the owner will ordinarily be difficult, it not impossible to find, or will have abandoned ownership. Although the salvage award is ordinarily a percentage of the proceeds of the sale of the salvaged property, or a percentage paid by the owner of the property for its return, salvage awards may be made *in specie*. Traditionally, the salvage award is a liberal award for meritorious service. It is not assessed as merely compensation *pro opera et labore*, nor under the principles *of quantum meruit*, but rather a more generous assessment, to promote the very policy of salvage, the saving of property and its importance in international maritime commerce.[142]

The opposition to the application of traditional salvage law to UCH can best be summarised by reference to the official commentary to the ILA draft article 4, which stated:

"It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations that from being allowed to remain where it is... The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value."[143]

It is therefore argued that salvage law is at odds with the preservation of UCH. It is important to note that this does not suggest that UCH does not, or should not, embody an economic value, only that salvage law, as the means of realising the economic value, is inappropriate as it causes an imbalance between the realisation of the economic and archaeological values of UCH.

As described earlier in this chapter, salvage law is applied when (a) property in marine peril in navigable waters is (b) through voluntary efforts (c) partially or totally successful in rescuing the property. This gives rise to (d) a possessory right to the recovered artefacts and the wreck site. As a result, the salvor is entitled to (e) a salvage award. As this controversy is at the heart of efforts to introduce a new international regime to preserve the archaeological value of UCH, it is necessary to briefly consider each of these elements.

Marine peril

As the existence of a state of marine peril is a requirement for the application of salvage law, those wishing to preserve the application of salvage law to the recovery of UCH have advocated a broad definition of the term, which relates not only to the physical threats to the objects, but also to the loss of its economic realisation.[144] Those wishing to

[141] For a more detailed discussion on *in rem* jurisdiction, see Owen *op.cit* pp.158-169
[142] Koenig *op.cit* p.278
[143] O'Keefe, P.J., and Nafziger, J.A.R., "The Draft Convention on the Protection of Underwater Cultural Heritage" 25(4) *Ocean Development & International Law* (1994) p.408; See also Brice (1996) *op.cit* p.337
[144] Should the wreck contain items of high economic value capable of re-entering the stream of commerce, it is argued that this, in itself, constitutes marine peril. Therefore, although it may be conceded that historic shipwrecks may not necessarily be in danger of destruction or degradation, it may continue to be in peril to the extent that artefacts of commercial value are lost to any productive economic use.

remove salvage law from the realm of UCH, have taken a narrower definition[145]. However, the courts of various jurisdictions, and implications of international law have not offered a consistent interpretation either way[146]. This may be a result, not only of

---

This justification for the application of salvage law may appear to exist in its retention in international law. Brice, referring to UNCLOS, states that " it is clear that the parties did regard the law of salvage as applicable to historic wreck presumably on the basis that they were to be regarded as 'immobilised' if in no other immediate or reasonably foreseeable physical danger." (Brice *op.cit* p.4-16). Articles of historic or archaeological importance may also be lost to social or academic use. These interpretations of marine peril are, however, not in conformity to the traditional interpretation as it applies to salvage law. "The essence of a salvage service is that it is a service rendered to property or life in danger. The requisite degree of danger is a real and appreciable danger. It must not be merely fanciful, but need not be immediate or absolute." (HS Vol. 43(1) para. 976). Once the existence of 'marine peril' is found, the actual degree of marine peril will only be a factor in the determination of the salvage award. The burden of proving the existence of marine peril falls upon the salvor, as without proper proof, there can be no claim for salvage. Thus, salvors will go to great lengths to find that the objects recovered are indeed in marine peril. This has included situation that cannot be regarded as emergency situations. Thus, the fact that all objects are subject to some deterioration has allowed this extension of the interpretation to cover non-emergency matters.

[145] The Archaeological communities have interpreted the term 'marine peril' in terms of the physical threat of destruction. It is argued that not only should the recovered artefacts not be returned to the stream of commerce, but that historic shipwrecks may have reached a stage of equilibrium with their marine environment at which the rate of degradation will be at a minimum, or even stop and are therefore not in marine peril (Barto Arnold III, J., "Some thought on salvage law and historic preservation" *7 International Journal of Archaeology* (1978) p.174). A UNESCO report on UCH states that historic wrecks that have been on the sea floor for a number of years are no longer in marine peril. Any disturbance of this state of equilibrium will only cause the process of degradation to recommence. (UNESCO Doc. 28C/39 Paris, October 1995 para. 31. See also McLaughlin *op.cit* pp. 182). The application of salvage law in these circumstances will therefore encourage excavation and recovery where it is not appropriate, endangering or even destroying the archaeological value of the UCH. The policy of preserving wrecks *in situ* advocated by many maritime archaeologists is subject to proven scientific analysis of rates of degradation of artefacts underwater. All matter is subject to natural deterioration. The rate of deterioration differs between objects on land and objects underwater. Quite obviously, the rate of deterioration in the water also differs in accordance with the water depth, temperature, oxygen levels, light levels, water movement and the existence of living organisms. The fact that objects underwater ordinarily undergo a slower rate of deterioration the longer the object has been submerged is ordinarily the justification for not recovering the objects. It is therefore the policy of most archaeological societies to promote preservation *in situ* and to encourage non-intrusive investigation. Actual excavation and recovery, it is argued, should only occur if the historic shipwreck in under threat. This presumably means that the rate of deterioration will usually speed up or the actual objects is under threat from destruction from a new force. Although it has been suggested that artefacts are better preserved in water than on land, particularly in deep cold conditions, it would appear than much depends on the location of each individual wreck. The increasing degradation of wrecks such as the *Titanic* and *Monitor* illustrate the difficulties of preservation *in situ*.

[146] Litigation in the US has proved to be the most illustrative of the way in which courts have interpreted 'marine peril'. In *Platoro Ltd, Inc, v. The Unidentified Remains of a Vessel* 614 F.2d 1051, at 1055-1056 (5th Cir. 1980) the court noted that "the artefacts came to rest on the clay bottom of the Gulf of Mexico, thirty to forty feet under water. Eventually four to ten feet of sand covered them. Under these conditions, the items were effectively impervious to weather conditions above the surface of the sea, and the sand prevented deterioration underwater. The items remained in this state of equilibrium until 1967 when Platoro commenced recovery operations"(508 F.2d 1113, at 1114 - 1115 n.1 (5th Cir. 1975). The court, however, held that, as a matter of law, marine peril will exist where a ship's location was unknown. The physical preservation of the artefacts was therefore not a consideration. In *Platoro Ltd. v. Unidentified Remains of a Vessel* (*Platoro III*) 695 F. 2d 893, at 901 n.1 (5th Cir, 1983), the court noted that; "... the *Espritu Santo* was still in marine peril after its position was discovered. Texas's only argument to the contrary is that the vessel is effectively sealed under a thick layer of sand and thereby protected; we observe first, that this is information which would be available only in hindsight and thus should not be considered in evaluating Platoro's actions, and second, that it is far from clear that the sand would remain sufficient protection from the various perils of the Gulf of Mexico." Similarly, in *Cobb Coin Co. v Unidentified, Wrecked and Abandoned Sailing Vessel* 549 F.Supp 540, at 557 (S.D.Fla. 1982) the court stated that; "Because the defendant vessel was still in marine peril of being lost through the action of the elements or of pirates and was not being successfully salved when the plaintiff undertook its salvage

regional variations in the development of salvage law, but also by the IMO failing to provide a definition of marine peril in the 1989 London Salvage Convention.[147] Thus, due to the varying definitions of marine peril[148], salvage law has not been consistently applied to the recovery of UCH. As such, salvage law does not promote a uniform system of law applicable to UCH and is therefore inappropriate as the basis for an international agreement.

While the interpretations of the meaning of 'marine peril' are inconsistent, what is does indicate, is that in order to apply salvage law to the recovery of UCH, a number of courts have attempted to bring these situation within the scope of traditional salvage law by manipulating the interpretation of 'marine peril'. Although the scope of salvage law has, *de facto* been widened by its application to the recovery of UCH; the justifications for doing so have relied heavily on the existence of marine peril, which, in comparison to the traditional salvage law meaning, can only be regarded as a legal fiction[149]. Thus, marine peril is assumed to exist solely in order to apply salvage law to UCH. The reasons for this may be a policy consideration. That is, to encourage the reporting and adjudication of finds to admiralty courts, particularly where the find is in international waters[150]. The creation of an international legal regime that will be applicable to the recovery of UCH, based on its historical importance, rather than the existence of marine peril, will therefore replace the necessity of having to determine whether salvage law is

---

operation, it was subject to a 'marine peril' for purposes of the plaintiff's salvage claim." In *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330, at 337 (5th Cir. 1978) the court held that "marine peril includes more than the threat of storm, fire, or piracy to a vessel in navigation". The court went on to state that if the vessel was lost, then it would constitute marine peril and that "[e]ven after discovery of the vessel's location it is still in peril of being lost through the actions of the elements". The threat of physical deterioration is therefore not necessarily a factor in determining the existence of marine peril. A number of further cases have simply presumed that a salvor or finder of property will have recourse to admiralty law, irrespective of the age or non-perishable nature of the property. For example, in *Thompson v, One Anchor and Two Anchor Chains* 221 F.770 (W.D.Wis 1916) the court held that "marine peril consisted in the fact that the property was actually lost" and the fact that the property was hardly likely to perish was irrelevant. Thus, the peril is the loss of commercial utilisation of the objects.(See also *Eads v. Brazelton* 22 Ark. 499 (1861) concerning bars of lead recovered from a wreck which had sunk 34 years earlier, *and Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F.Supp, 452 (E.D.Va. 1960) concerning block of Italian marble recovered from a wreck which had sunk 66 years earlier). However, in *Subaqueous Exploration & Archaeology Ltd v The Unidentified Wrecked and Abandoned Vessel* 577 F.Supp, 597, at 611 (D. Md. 1983), the court held that "marine antiquities which have been undisturbed for centuries" are not proper subjects of salvage because they are not in marine peril. Similarly, in the Canadian case, *Her Majesty The Queen in Right of Ontario v. Mar-Dive Corporation et al.* 1997 AMC 1000, the court held that a wreck embedded in the bottom of Lake Erie was not in marine peril, and therefore the salvors of a number of artefacts from the wreck were not entitled to a salvage award. In fact, the court held that the activities of the salvors had damaged the wreck and significantly damaged its archaeological integrity, and that proposed further action would not save the vessel but cause the wreck to be in even greater danger. Fletcher-Tomenius, P., O'Keefe, P.J. and Williams. M., "Salvor in Possession: Friend or Foe to Marine Archaeology" 9(2) *International Journal of Cultural Property* (2000) p.263

[147] Dromgoole, S and Gaskell, N., "Draft UNESCO Convention on the Protection of the Underwater Cultural heritage 1998" 14(2) *International Journal of Maritime and Coastal Law* (1999) p.188

[148] While the courts have not been able to provide a definitive interpretation of the meaning of 'marine peril', commentators on these decisions have been equally divided. Both Brice and Owen argue that the rulings in *Subaqueous Exploration & Archaeology Ltd v The Unidentified Wrecked and Abandoned Vessel* 577 F.Supp, 597, (D. Md. 1983) and *Klein v. The Unidentified Wrecked and Abandoned Sailing Vessel* 1985 AMC 2970 to the effect that wrecks are no longer in danger and that salvage law should not therefore apply, are wrong. (Brice (1996) *op.cit* p.339 and Owen *op.cit* p.145). On the other hand, Stevens, argues that historic shipwrecks protected by the ASA are not in marine peril and therefore should not be the subject of salvage law. (Stevens *op.cit* p.602).

[149] Nafziger *op.cit* pp.81-96

[150] Lawrence *op.cit* p.276

applicable. The extent to which the UCH is in 'marine peril' in the sense that it is in danger of physical destruction or damage, however, will continue to be an important element of this regime as it will be a determining factor as to whether the UCH should be recovered or preserved *in situ*.

Voluntary efforts

The requirement that the action of the salvor be voluntary encourages the saving of property in marine peril without prior permission of the owner of that property.[151] This is therefore closely related to the requirement of marine peril. While this is an advantage in cases where the property is in imminent danger, and to wait until prior permission of the owner to handle his/her property would result in its destruction, it is not necessarily the case for UCH. Whatever definition is given to marine peril, it is unlikely that UCH will be in so immediate a danger that the owner cannot be contacted. However, given the broad definition of marine peril, salvors have been able to recover UCH without the owner's prior permission based on salvage law. In cases where the owner may wish the UCH to remain *in situ*, or encourage non-intrusive investigation, he/she may not necessarily be able to do so unless the salvors are aware of the owners' whereabouts and his/her intention.

Success

Salvage law requires the salvor to show that the salvage service has been a success. Traditionally, success refers to the saving of the property from marine peril. Quite what success means in terms of the salvage of UCH is uncertain. An obvious conclusion is the recovery of the UCH. While this may amount to success in terms of recovery and allowing economically valuable commodities to re-enter the stream of commerce, it may not necessarily be successful in terms of preserving the archaeological value of the UCH. The promotion of recovery of all economically viable UCH in the present, ignores the principles of conservation of diversity and quality of intergenerational equity, to the detriment of future generations and is therefore antithetical to the archaeological principle of *in situ* preservation.[152]

---

[151] Salvage services may, however, be agreed upon contractually between the salvor and the owner of a vessel (or UCH). Contractual salvage has the effect of possibly altering a number of important aspects of voluntary salvage law, to the possible determinant of UCH. Contract salvage also has the effect of assessing the salvors conduct before the recovery operation, and cannot take into account archaeological standards once the recovery operation is underway. Contractual salvage may also dispense with other elements of voluntary salvage, such as the elimination of the requirement that the vessel be in marine peril. Thus, an owner of an historic vessel may contract with a salvor to excavate the site irrespective of whether it would be preferable to leave the site *in situ*. Contractual salvage can, however, be used to preserve UCH if the contract stipulates that the recovery operation is to be conducted under strict archaeological supervision, using appropriate techniques, etc. (See further Lawrence *op.cit* pp.291-338: McLaughlin *op.cit* pp.149-198).

[152] However, leaving UCH *in situ* does leave them open to illicit excavation. For example, a number of cannon disappeared form both the VOC wreck *Amsterdam* and the wreck of the Royal Yacht *Mary* due to the inadequate protection afforded to wrecks *in situ* by the Merchant Shipping Act of 1894.(Korthals-Altes, A., "Submarine Antiquities: A Legal Labyrinth" 4 *Syracuse journal of International Law and Commerce* (1976) p.92). More recently, cannon have been stolen from the archaeological site of an 18th century shipwreck off the coast of Florida during a break in the excavation work (*Florida Times*, "Pirates sink low, steal cannons from St.Augustine shipwreck " August 4, 1999). See also "Wreck plunderers find way through law on war graves: Battleship Royal Oak" *The Times*, April 4, 1994. The application of salvage law will allow the salvor to obtain a possessory right over the UCH as well as artefacts recovered from the site, and allow the salvor to ensure that no illicit excavation occurs. However, where this

Exclusive possession

Salvage law encourages the recovery of UCH. This is particularly the case in that before a salvor is able to obtain exclusive access to an UCH site, the salvor must prove that he has possession of the site[153]. The easiest manner in which to do this is to recover an article from the site. As such, the application of salvage law does not encourage pre-disturbance surveys, from which valuable archaeological information can be gained. A salvor may therefore undertake an excavation before realising the importance of the UCH site, thus disturbing artefacts and destroying important archaeological information. The removal of artefacts will prejudice the integrity of the site. In the case of chance finds, particularly by sports divers, who may not recognise the archaeological importance of the wreck, it will be almost impossible to prevent recovery, short of a blanket ban on the recovery of all objects from underwater. However, the policing and prosecution difficulties associated with this approach would make such a system difficult to administer.[154]

It is essential to encourage a finder to voluntarily report a find before recovering any artefacts, so that qualified archaeologists can determine the archaeological importance of a site. This is best achieved by providing either a financial incentive and/or a recreational incentive to the finder. The latter includes allowing the finder to participate in the surveying and excavation of the site. The policy behind the high salvage awards that have been awarded by US and UK admiralty courts has been to encourage the reporting of archaeologically important finds[155]. Normally the application of salvage law would provide the financial incentive for the reporting of finds and recovery of artefacts. It does not, however, provide sufficient incentive for reporting of finds without recovering any property.[156] A salvor may wish to work in as much secrecy as possible until such time as the UCH has been recovered and the site is no longer susceptible to third party interference. It would appear from US writers that a would-be-salvor is not entitled to a salvage award merely on the strength of having discovered a wreck and having the intention to recover it. As salvage law requires the finder to have actual or

---

possessory right cannot be enforced, it is of little use in preserving UCH *in situ*. In these circumstances, excavation and recovery may be appropriate.

[153] The courts have held that possession is a matter of fact and degree, and will consider firstly, the salvors *animus possidendi* and secondly that the salvor has "exercised such use and occupation as is reasonably practicable having regard to the subject matter of the derelict, its location and the practice of the salvors."(*Morris v. Lyonesse Salvage Co. Ltd (The Association & The Romney)* [1970] 2 Lloyd's List L.R. 59 (Adm. 1970)at p.61.

[154] Dromgoole, S., "Protection of Historic Wreck: The UK Approach: Part II: Towards Reform" 4 *International Journal of Estuarine and Coastal Law* (1989) p.103.

[155] The determinations of the salvage award for the recovery of artefacts from an historic wreck have tend to be extremely high. In the UK it is 100% of the net proceeds of the sale of the artefacts, and in the US it is often greater than 75% of the value of the property. It is submitted that in cases where salvage law continues to be applied to UCH, these high salvage rewards should be based on additional factors, such as the extent to which the archaeological and historical integrity of the wreck is preserved. Administrative bodies awarding salvage awards should take greater steps to encourage appropriate archaeological excavation through the manipulation of the sizes of the salvage awards. Similarly, the duties that a salvor owes an owner under salvage law principles can be used in the case of manifest incompetence of the salvor to allow a court to retract the possessory rights of a salvor, and perhaps vest them in another salvor. This can ensure that a salvor who does not use the most appropriate methods to excavate an historic wreck may lose his position as salvor-in-possession to another.

[156] For example, Owen argues that in the US case *Subaqueous Underwater Surveys Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*557 F.Supp 597 (D.Md. 1983), the court should have dismissed the salvors claim to title of the abandoned vessel as the salvor had in fact not yet recovered anything from the site. As such, the court would not have any objects upon which to base its *in rem* admiralty jurisdiction, nor would the salvor have anything upon which a maritime lien would vest.

constructive possession of UCH, the discoverer of a site is not entitled to ownership or possession of the UCH merely on the basis that it has been discovered. A discoverer will therefore be under a great deal of pressure to recover some artefacts in order to obtain possession of the UCH before he can rely on the protective mechanisms of salvage law or the law of finds.[157] Although discovery of an UCH site is insufficient to vest exclusive salvage rights in a finder, the increasing recognition of telepresence[158] as sufficient to constitute continued possession in the finder without the finder having to recover artefacts from the site has gone some way in preserving the archaeological value of the UCH.[159] However, if salvage law does encourage a finder to recover artefacts rather than report their existence to an archaeological institution, it has been suggested that a finder's award should be established rather than the payment of a salvage award, which need not necessarily amount to as high an award as would a salvage award[160]. This system would ordinarily be associated with a blanket ban on salvage. As such, much would again depend on the ability to police such a system, as a finder who believes that he would be able to obtain greater reward for an illicit excavation than from a finders award will not necessarily report the find. Finder's awards are used in a number of countries, such as Australia, Denmark, Norway and Finland.[161]

The application of salvage law to UCH does, however, have an advantage in that the salvor-in-possession is granted exclusive possession of an UCH site. Once granted exclusive possession of the UCH site, this may have benefits for the realisation of the UCH's archaeological value. The ability of a salvor to obtain sole possessory right to a derelict is particularly important in the case of UCH, as it is almost impossible for a salvor to maintain constant presence at an UCH site, particularly in international waters. Detailed archaeological excavation may take considerable periods of time, and in cases where the weather windows allow for only very short periods of excavation, the salvors possessory right need to be maintained whilst incapable of being on site.

---

[157] Owen *op.cit* p.156

[158] Telepresence refers to the ability of the salvors to locate UCH and use remotely operated vehicles (ROV's) to investigate the site and to provide real time imaging of the wreck.

[159] *In Columbus America Discovery Group v The Unidentified, Wrecked and Abandoned Sailing Vessel* (1989) AMC 1955 the court held that telepresence may be sufficient to constitute continued possession. The success of the Jason Project has also highlighted the importance of telepresence as a possible means of achieving exclusive salvage rights. The Jason project involved the transmission of real time images from a remotely operated vehicle on the wreck site to numerous schools throughout the US. (For a discussion on the Jason Project, see Ballard, R.D., *Explorations: An Autobiography* (1995) Weidenfeld & Nicolson). Presuming that future salvors are able to charge a fee for viewing such images, it is possible for a salvor to recuperate the costs of an expedition through these activities. Therefore, a salvor would be able to establish exclusive possessory rights, and recoup the costs of the expedition through the sale of images of the wreck, rather than through the recovery of artefacts, thus preserving the UCH *in situ*. However, in order to do this, the salvor would have to obtain the exclusive right, as salvor, to film and photograph the wreck.. The recent decision in *R.M.S Titanic, Inc v Christopher Haver and Deep Ocean Expeditions* 171 F.3d 943 (4th Cir. 1999) does, however, undermine this development in that the court held that a salvor-in-possession does not have the exclusive right to photograph and film the wreck. This is an unfortunate decision as it encourages the recovery of artefacts by a salvor. Thus this limitation has hampered the ability of salvage law to adapt to the new applications to historic wreck, and suggests that an alternative regime may be necessary. See Forrest, C.J.S., "Salvage Law and the Wreck of the Titanic" 1 *Lloyd's Maritime and Commercial Law Quarterly* (2000) pp.1-10.

[160] Finders fee was proposed by Recommendation 848 (Council of Europe). See Dromgoole and Gaskell, *op.cit* p.172

[161] The European Draft Convention had proposed the imposition of a fixed finder's award for the reporting of artefact or sites, with the latter receiving a higher award than the former in order to encourage the reporting of sites rather than the recovery of artefacts. See Dromgoole (1989 Part II) *op.cit* p.105

Salvage award

Salvage law does not necessarily make the preservation of the archaeological value a criteria for its application. At best, the preservation is a factor to be taken into account when determining the salvage award[162]. Salvage law necessitates a sale of UCH in order to award a salvage award to the salvor. The award can therefore only be realised if the UCH is recovered. Increasingly salvors reap economic rewards from sources other than through the sale of the recovered UCH, such as through the sale of film and TV rights. Such benefits are, however, an indirect benefit from the application of salvage law and arise only through the granting of exclusive possession to the salvor.

Conclusion

Salvage law prompts the recovery of UCH, often prior to the undertaking of any pre-disturbance surveys to investigate the archaeological importance of the UCH; encourages the sale of artefacts and splitting up of collections; and encourages quick and unscientific excavation techniques. As such, it is an inappropriate basis upon which to base any legal regime applicable to UCH. This is reflected in a number of States' legislation applicable to UCH.[163] However, it has been stated that "[i]t is well accepted that one of the most important features of an effective legal system is its capacity to reflect the changing needs and demands of a society in which it operates."[164] As such, it has been argued that salvage law is not a rigid system of law and is capable of adapting to new situations, and as such, is able to take into account the need to preserve the archaeological value of UCH.[165] Certainly, in the US, admiralty courts have begun to take cognisance of the archaeological value of UCH subject to salvage law[166]. However, this recognition only goes to the determination of the salvage award[167], and the

---

[162] The preservation of the archaeological value of an historic wreck should, it is submitted, be a constituent criteria for the application of salvage law if indeed this regime is to continue to apply to historic wreck. US admiralty courts and administration of salvage law in the US and UK have tended, however, to view the extent of the archaeological preservation measures as a measure of the salvage award. The criteria for the application of a salvage award, as specified in article 13 of the 1989 London Salvage Convention can be interpreted to require the salvor to protect the historical and archaeological integrity of historic wreck. For example, article 13(1)(f) of 1989 Convention requires the court to take into account the time and money spent by the salvor in undertaking the salvage. In the case of the excavation of an historic wreck, the court should therefore take into account the time and money spent on archival research as well as the often lengthy time periods needed to excavate historic wreck to professional archaeological standards. This would prevent a salvor from excavating an historic wreck as quickly as possible, thereby destroying much of the archaeological integrity of the wreck.

[163] See for example the chapters on France, Italy, Greece, Ireland, Turkey, Spain and Australia in Dromgoole, S.(ed.), *Legal Protection of the Underwater Cultural heritage: National and International Perspectives* (1999) Kluwer Law International

[164] Danilenko, G.M., *Law-Making in the International Community* Martinus Nijhoff (1993) p.1

[165] Bederman, D.J., "Historic Salvage and the Law of the Sea" Paper Presented at the thirty-first Annual Conference of the Law of the Sea Institute, University of Miami, Florida, March 30-31 1998 p.10; Bederman, D., "The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal" 30(2) *Journal of Maritime law and Commerce* (1999) pp.331–354

[166] In *Cobb Coin., Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel* 549 F Supp. 540 (S.D.Fla, 1982) "the court suggested that Federal admiralty principles, as applied to the salvage of historic shipwrecks, could be fashioned to safeguard the artefacts and invaluable archaeological information associated with the shipwreck, and the public's interest in the shipwreck could be accommodated through a proper award of a portion of the artefacts to the state of Florida". The court went on to state that "in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance it is an essential element that the salvor document to the Admiralty Court's satisfaction that it has preserved the archaeological provenance of the shipwreck." 549 F.Supp. 540, at 559 (S.D.Fla.1982)(See also Shellcross, D.B., and Giesecke, A.G., "Recent Developments in Litigation

application of salvage law to UCH continues to promote the policy of recovery. Without requiring the preservation of the archaeological value of UCH as a substantive element of the criteria of success, salvage law will not preserve all the attributed values to the UCH.

Clearly, the application of salvage law has not been able to preserve the archaeological value of UCH. Although its application in US courts has indicated an awareness of this importance, and adapted to a certain extent, it is still insufficient as a preservation regime. Nevertheless, salvage law is the basis upon which such activities have been conducted, and any new regime has to take into account the positive aspects of this regime that promote the preservation of UCH. Most important of which, is the economic incentive for the research and possible recovery of UCH and the possibility of co-operation between the various interest groups so as to realise all the values attributed to the UCH. Governments cannot always finance the search for and recovery of UCH, which may be necessary if the UCH is genuinely in danger of destruction or deterioration, or may provide needed scientific evidence.

Concerning the Recovery of Historic Shipwrecks" 10(2) *Syracuse Journal of International Law and Commerce* (1982) p.400; Herscher *op.cit* p. 95; Bederman (1998) *op.cit* p. 10). In *MDM Salvage* 631 F.Supp. 308, 310 - 311 (S.D.Fla.1986), the Federal District Court denied the applications of two different sets of commercial salvors to recover property from a Spanish galleon as neither firm had attempted to preserve the 'archaeological integrity' of the wreck. The court noted that "Archaeological preservation, onsite photography, and the marking of sites are particularly important ... as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought." In *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel* 568 F.Supp. 1562, at 1568 (S.D.Fla. 1983) the court denied a salvage award in part due to the salvors unscientific method of excavation which did not protect the archaeological and historical integrity of the shipwreck. The court took into account the skills of the salvor in protecting the archaeological and historical integrity of the wreck in *Columbus-America Discovery Group v. Atlantic Mutual Insurance*742 F.Supp 1327 (E.D.Va. 1990); 974 F.2d 450 (4th Cir.1992). However, the court gave no indication as to why it thought that the salvor had satisfied the criteria of archaeological and historical protection, and on what basis it should therefore receive a significant portion of the gold recovered from the shipwreck. In this case, the salvor had been commended for the archaeological standards maintained during the recovery operation by the National Marine Historic Society, the National Association of Academics of Science and the Explorers Club. (See also *Deep Sea Research v. The Brother Jonathan* 883 F.Supp 1343, and *RMS Titanic Inc. v. The Wrecked and Abandoned Vessel, ("Titanic I")* 1996 AMC 2481, (E.D.Va. 1996). However, in *Platoro Ltd. v. The Unidentified Remains of a Vessel* 518 F.Supp 816, 822 (W.D.Texas 1981) the Court for the Western District of Texas specifically declined to hold the salvors to the standards required of marine archaeology, as the State had urged. (See *also* Moyer v, The Andrea Doria, 836 F.Supp.1099, 1107 (D.N.J.1993). It should be noted that while a number of these decisions have found that the salvors partially or totally succeeded in preserving the archaeological and historical integrity of the historic wreck, professional archaeologists have differed and argued that the standards which the court has accepted as 'good' archaeology are in fact poor, and that the courts are not qualified to determine these standards. This is particularly true in some cases in which the courts did not seek to consult any known underwater archaeologist to determine whether the standards of excavation were appropriate to historic wreck. (*Columbus-America Discovery Group v. Atlantic Mutual Insurance* 974 F.2d 450 (4th Cir. Aug. 1992). Similarly, it may be difficult to determine if in fact these standards have been maintained. See further Fletcher-Tomenius *et.al op.cit* p.293.

[167] The salvage reward is given for benefits actually conferred, not for a service attempted to be rendered. If, therefore, a salvor of UCH is able to preserve the archaeological value, the benefit to the general public and scholarly activity will be increased, thus giving rise to a higher salvage award than would have been awarded had the salvor not preserved these attributes.

The economic value of underwater cultural heritage

Salvage law is the mechanism through which the treasure salvage community is able to realise the economic value of UCH. While salvage law is indeed antithetical to the preservation of the archaeological value of UCH, it does not necessarily follow that the economic utilisation of UCH also stands in such a position. Many of the arguments raised by underwater archaeologists against the commercial exploitation of UCH concerns the results that have in the past often been the outcome of commercial operations, but do not concern the underlying policy objective of salvage law, namely, the saving and reintroduction of goods to the stream of commerce. For example, it may be possible to commercially exploit UCH without splitting up a collection, selling the artefacts and through the adoption of appropriate archaeological standards.

There is, however, a 'purist' sector of the archaeological community that argue, on a doctrinal level, that the commercial exploitation of the UCH is morally and ethically wrong. While many archaeological organisations contain codes of ethics that prevent members from taking part in commercial recovery operations, it is difficult to determine exactly why such a stance is taken. It is therefore questionable whether such ethical considerations should be placed on a normative footing. This ethical opposition to the commercial recovery of UCH is often articulated in terms of opposition to the sale and private ownership of UCH.[168] It is argued that UCH constitutes a public resource, and should be regarded as the property of humankind as a whole. As such, private interests, it is argued, should be eliminated in favour of the public interest[169].

The current international legal regime applicable to UCH in international waters allows for private interests in UCH in the form of the owner and salvor. As such, UCH, as a body of contemporary material, consists of material things, that may, in economic terms, be regarded as goods or as commodities[170] and can be attributed an economic value. A commodity can be defined as goods that have an exchange value, the extent of which is dependent on the social context in which it circulates. It may be possible to raise goods to a level above that of a commodity when the goods are considered of such importance that it is 'priceless' and not susceptible to exchange[171]. While it is recognised that the UCH has a public good quality, attempts to elevate the resource to a level above that of a commodity give rise to conflicts between the private and public utilisation of this resource. However, as King clearly illustrates, public resources are often made available to private individuals and corporations to be utilised in profit-making ventures[172]. Such ventures contribute to the public good by producing wealth and the increasing extent of privatisation of public utilities in many countries emphasises the

---

[168] King *op.cit* p.4

[169] In regard to the collection of Pre-Columbian antiquities from Mexico, Litvak King suggests that "most serious collectors spend enough money on their collection and care so much about it that they would be willing to spend an equivalent amount of money on sponsoring and participating in well-controlled, well-designed and scientifically valid archaeological digs, if they get to keep and show and possess the pieces for an agreed number of years, subject to showing and lending then for research. Then after a reasonable number of years [the pieces would be] returned to the national patrimony." This was, however, regarded as unworkable by a number of other panel members at which this suggestion was made. This was so particularly because it ignores the economic value of the cultural heritage, which investors in such excavation would want to retain. Messenger *op.cit* p.222

[170] Carman *op.cit* p.27

[171] For a discussion on 'Rubbish Theory and 'the theory of goods', see *Ibid* pp.20-26 and Douglas, M. and Isherwood. B., *The World of Goods* (1979) Basic Books Inc

[172] King *op.cit* p.5

increasing utilisation of combinations of private and public uses.[173] Fletcher-Tomenius *et.al* points out that such as debate raises economic question concerning the role of government intervention in the functioning of the market of commodities.[174] While "it is quite evident that we cannot and, in fact, do not rely entirely on traditional market forces transaction to generate the volume and quality of cultural heritage object desired"[175], the uncertainty pertains to the extent of the intervention in the market or its abolition[176]. A number of economists have argued for a combination between private and public use of cultural heritage. Hutter, for example states,

> "Cultural heritage regulation usually aims at removing objects from the commercial sphere, reserving them for the purpose of contemplation, reflection and enjoyment, That, however, is only one end of the possible spectrum of uses. The opposite end would be the unconscious private use of heritage objects, such as the use of a Greek temple as a stable, or the use of a Veronese as a bedroom decoration. In between there are many possible combinations of private and public uses ..."[177]

It has been argued that any attempt to 'protect' cultural heritage by its legal elevation to a position above that of a commodity, thus attempting to eliminate the market, only results in the market going underground. The 'protection' of the terrestrial cultural heritage in this way has led to the creation of a billion dollar black-market.[178] Thus, Bator argues that "total embargoes are not only impossible to enforce, but actually encourages the illicit market rather than remove it."[179] Similarly, in 1970, a prominent Museum Director stated, in relation to the negotiations regarding the 1970 UNESCO Convention, that "[i]t is unrealistic to expect to stop all trade in archaeological objects and in fact a legal trade should help to stop the illicit trade."[180] As the poorer countries of the world are often source States, a thriving black-market has arisen in terrestrial cultural heritage as a result of economic necessity - "an overriding circumstance which explains, if it does not justify, the destruction of the past."[181]

The international trade in art and antiquities is thriving, and record amounts continue to be paid for unique items. Items of cultural heritage, whether held by public institutions or private individuals, are therefore subject to economic valuation. These objects are not only economically valued in terms of the direct price paid for their acquisition, but are the subject of other economic considerations in terms of insurance premiums and evaluations, taxation values and security costs. In cases where States regard specific objects of cultural heritage as unsusceptible to private ownership, these objects continue

---

[173] On the subject of changes in the archaeological and underwater archaeological environment, in regard to privatisation, public purse and private investment, see: Smith, W.C., Grebmeier, J., Green, R.L., and Duskin, D., "Puget Sound: A Progress Report from the Centre for Marine Archaeology" in Watts, G.P (ed) Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference on Underwater Archaeology (1981) Fathom Eight pp. 348-367. For an example of the application of privatisation policies with regard to cultural heritage, see Mossetto, G,M "Privatization Policies in Venice" in Hutter and Rizzo *op.cit* pp.185-195

[174] Fletcher-Tomenius *et.al op.cit* p.263

[175] Hutter and Rizzo *op.cit* p.6

[176] A detailed discussion of the economic theory and policy is beyond the scope of this thesis. For a further discussion on the economic theory of intervention in the market for cultural property, see Throsby, D., "Seven Questions in the Economics of Cultural Heritage" and Koboldt, C., "Optimising the Use of Cultural Heritage" in Hutter and *Rizzo op.cit* pp.19-30 and 57-73

[177] Hutter and Rizzo *op.cit* p.8

[178] Nafziger, J.A.R., "International Penal Aspects of Protecting Cultural Property" 16 International Lawyer (1985) p.835; Nafziger, J.A.R., "Comments on the Relevance of Law and Culture to Cultural Property Law" 10 *Syracuse Journal of International Law* (1983) p.325

[179] Messenger *op.cit* p.xxi

[180] Meyer *op.cit* p.186

[181] *Ibid* p.197

to be subject to many of these economic considerations, particularly in regard to State budgetary constraints. The elimination of the market for UCH will not necessarily mean that UCH could not be conducted for a commercial purpose. For example, a State funded museum might contract a company to recover UCH, allowing the company to charge for the service and make a profit. If conducted to appropriate standards so that the archaeological value of the UCH is maximised, and the items of UCH are not subject to market forces, but vested in the museum on behalf of the public, there is no reason for the archaeological community to oppose such a commercial recovery. Indeed, this may be a particularly useful service when UCH *in situ* is in danger of being destroyed and the State does not have the wherewithall to undertake an emergency excavation. The opposition to the commercial recovery of UCH must therefore rest solely on the possibility of items of UCH being subject to market forces.

While not opposed in principle to the private ownership of UCH, some archaeologists have argued that the consequences of such a policy leads to the splitting up of collections that should be kept together for further scientific study[182]. While it is true that this may occur, it is not necessarily inevitable, and it is certainly feasible that an entire collection could be sold as a single entity.[183] It may also be debatable as to whether all items recovered from an UCH archaeological site form part of the artefact collection.[184] Treasure salvors have also argued that a difference needs to be made between cultural artefacts, with little economic value though high cultural value, and trade goods of high economic value but often low cultural value as they are normally found in large numbers with little to differentiate each item, such as coins, bullion and porcelain.[185] A representative sample could be kept of these trade items while the remainder may be separated from the collection.[186] It is argued that the collection of redundant multiple artefacts[187] and data is "neither good science nor a cost effective use of funds and resources, whether they be public or private"[188] and that to prohibit the recovery of all UCH, or to prohibit the sale of all trade goods that are found in large numbers is an unbalanced public policy. It has been argued that archaeologically important artefacts should be preserved in a museum, and not in private collections. The commercial recovery and sale of artefact results in museums having to compete on the open market with private purchases in order to obtain these artefacts. This, it is argued, gives precedence to the salvor, at the expense of museums and by implication, the general public. While it may be of some help to allow a national museum the right of first

---

[182] Varmer *op.cit* p.2. Nafziger states that "the profit basis of salvage, ... encourages commercial salvors, who must recover their costs, to fragment or disintegrate heritage for sale and thereby disperse recovered artefacts to the detriment of historic enquiry." Nafziger *op.cit* p.82

[183] RMST Inc, the savlors of the *RMS Titanic*, have stipulated that no artefacts from the collection would be sold individually, and that the company would only sell the collection as a single entity.

[184] For example, coal recovered form the *RMS Titanic* is regarded as forming part of the cultural collection of artefacts by the salvage company, RMST Inc.

[185] Stemm, G., "Differentiation of Shipwreck Artefacts as a Cultural Resource management Tool" paper distributed at the 2000 Meeting. Meyer states that "archaeologists assert that in any given dig some ninety per cent of all objects unearthed can be classified as duplicates. Much of this material could be legally sold, satisfying at least the collecting appetites of those with a moderate income, with the money used to support excavation." Meyer *op.cit* p.186. Whilst this was written 27 years ago, the logic could still hold true in relation to both terrestrial and underwater archaeology.

[186] Stemm (1998) *op.cit* p.4

[187] The excavation of the Tudor warship the *Mary Rose* resulted in the recovery of authentic items of archery which had been extremely scarce before the excavation. Included were thousands of arrows, " so many that they represent a real storage problem." McKee, A., *How we found the Mary Rose* Souvenir Press (1982) p.121

[188] Roach, *op.cit* p.9.

refusal to purchase artefacts,[189] museums will still have to pay the market value for the artefacts, which increasingly, national museums cannot afford. Treasure salvors have argued that commercial recovery operations do not necessarily need to sell artefacts to raise funds. Increasingly, profits are being generated through media rights, such as films, documentaries[190], books[191] and exhibitions of recovered artefacts as well as the sale of replicas of these artefacts.[192] More recently, treasure salvors have been raising funds by allowing tourists to accompany their expeditions.[193]

Unfortunately, it is difficult to find a balance between the recognition of the archaeological value of UCH and its economic value. Where the latter is given prominence, the former may not always be realised. It has therefore been suggested that elimination of the economic value will ensure that the archaeological value is preserved. Given the difficulties in policing the oceans, and the lessons that can be learned from the emergence of the black-market in terrestrial cultural heritage, it is of the utmost importance that a preservation regime for UCH be established which achieves a balance between these attributable values of UCH.

Co-operation between user groups

The conflict between the archaeological community and the treasure salvage community has been fuelled and maintained by the popular media. In the US during the 1980's, much of the litigation involving wrecks such as the *Atocha*,[194] concerned jurisdictional conflicts between State and the Federal Admiralty courts, yet were eventually portrayed by the media as archaeologist versus salvor disputes[195]. The media has consistently highlighted the extremes in the points of view, and this perceived conflict has been used to exaggerate the danger, romance and adventure associated with shipwreck discovery and recovery. The impression is given that there is an abundance of treasure beneath the sea that offers the finder vast and quick fortunes. This has enabled unscrupulous salvage companies to profit from the sale of shares through media hype in projects that have little, if any, chance of success.[196]

---

[189] Dromgoole states that in Ireland, internal government proposals have suggested that the national statute be altered to include the right of first refusal for the National Museum. See Dromgoole (1993) *op.cit* p.2-30 footnote 100.

[190] See for example the recent documentary series viewed on the BBC in March and April 2000 covering the wrecks of the *Queens Anne's Revenge* in US territorial waters, the *HMS Pandora* in Australian territorial waters and the submarine *M2* and vessel *Swan* in UK territorial waters.

[191] A number of books on discoveries and recoveries of shipwrecks have recently been published, including a number of publications on the *R.M.S.Titanic*, such as Ballard, R.D., *The Discovery of the Titanic* (1987) Guild Publishing, London; McCluskie, T, Sharpe, M and Marriott, L., *Titanic and Her Sisters Olympic and Brittanic* (1999) Parkgate Books, London; and Wels, S., *Titanic: Legacy of the Worlds Greatest Ocean Liner* (1997) Tehabi Books and Time Life Books. Others include Cussler, C., *The Sea Hunters* (1996) Simon and Schuster, London; Robinson, C.M., *Shark of the Confederacy: The Story of the CSS Alabama* (1995) Leo Cooper; London Pickford, N., *The Atlas of Shipwrecks and Treasure* (1994) Dorling Kindersley, London; Jessop, K., *Goldfinder* (1998) Simon and Schuster, London; Beasant,J., *Stalin's Silver* (1995) Bloomsbury, London; and Kinder, G., *Ship of Gold in the Deep Blue Sea* (1998) The Atlantic Monthly Press, New York

[192] The huge success of the *R.M.S. Titanic* exhibition in Greenwich, UK and St.Petersburg Florida bears testimony to the possible success of a salvage operation that does not rely on the sale of recovered artefacts.

[193] *St.Petersberg Times*, "Hunt for treasure, but it'll cost a pretty boubloon", September 1, 2000

[194] See Delgado *op.cit* p. 298.

[195] Cockrell (1981) *op.cit* p.311

[196] In 1980 Cockrell has suggested that the "the introduction of the potential for great profits through pyramidal stock manipulations has become the most significant factor in the current legal and media

While the 'purist' archaeological community will not recognise the economic value of UCH, others have done so, and there are a number of examples of co-operation between archaeologists, governments, sports divers and treasure salvors.[197] The archaeological 'pragmatists'[198] argue that UCH sites will be excavated by amateurs and treasure salvors, legally in some State's territory, illegally in others. In those cases where the excavation is legal, yet commercial, the archaeological pragmatists have worked with the salvors in order to save as much archaeological information as possible.[199] A number of States have legislation that requires amateur archaeologists and treasure salvors to co-operate with archaeologists in the recovery of historic wrecks.[200] The basis upon which these groups can co-operate is the recognition of the variety of values inherent in the UCH and a realistic development of a hierarchy of values.

There are also indications that the treasure salvage community recognise the archaeological value of the UCH and are willing to co-operate with archaeologists in order to realise this value. UNESCO have recognised that "there are indications that serious professional salvors would welcome clear rules that would prevent controversy, of which there is at present a good deal, over the treatment of historic wreck."[201] The US treasure salvage community is arguably the largest, most technically advanced and best funded in the world. Its history, however, is plagued with examples of confrontations with the archaeological community, and accusations of looting, destruction of low economic value cultural heritage items and loss of archaeological data. Many of these criticisms are well founded, and the treasure salvage community has begun to take cognisance of the archaeological value of UCH. As the technology to recover UCH in deep waters developed and became more cost effective, so more treasure salvors began moving into international waters. This coincided with the growing awareness of the archaeological value of UCH and many of the deepwater recovery operations began to be undertaken in accordance with acceptable archaeological standards. In 1996, a number of these companies established the Deep Shipwreck Explorer's Association to

---

attack on our endangered past." Cockrell (1981) *op.cit* p.312. It would appear that little has changed over the past 18 years, and the sale of shares in recovery operations continue.

[197] Examples include the 'Maple Leaf' project off Jacksonville, Florida. See Brice (1996) *op.cit* pp.337-342 at p.340; the Salcombe Cannon wreck site, off Devon, UK. See Fenwick, V. and Gale, A., *Historic Shipwrecks: Discovered, Protected and Investigated* (1998) Tempus p.86

[198] The term 'archaeological pragmatists' is used to refer to those professional archaeologists who have, or advocate, working together with treasure salvors, and include Margret Rule (Mary Rose Trust), Mensun Bound (Oxford MARE), Chris Underwood (Nautical Archaeological Society), Martin Dean (UK Archaeological Diving Unit) and John Broadwater (NOAA Monitor Marine Sanctuary).

[199] Green *op.cit* p.4

[200] This includes the UK, South Africa, France and the US. In the US, for example, the Florida State programme has been proposed as an example of a successful co-operative programme between the State and salvors. Salvors realise that the State permitting system preserve both the historical integrity of historic wrecks and the marine environment. It also acts as a clearing house for salvors, which increases the credibility of those who are able to obtain salvage permits, enabling these salvors to attract more investors. The State had recognised that the salvage communities are able to undertake excavation that the state would not be able to afford. It should also be noted that although the excavations of the *Atosha* were often criticised by archaeologist, who feared that having obtained title to the wreck, it would be destroyed, the company *Treasure Salvors, Inc* have in fact entered into an agreement with the State of Florida regarding the preservation of archaeological data on sites arrested under admiralty law. This agreement states that *Treasure Salvors, Inc* and the State will act with "mutual co-operation and goodwill" to maintain the archaeological integrity of all shipwreck sites. All excavation are being conducted pursuant to guidelines set up by a five man committee, consisting of two representatives of salvors, two of the State and a third from the Florida State Museum. Herscher (1984) *op.cit* pp.94 and 226. Guidelines are reprinted on pp.227–229. See also *Management Plan for Florida's Submerged Cultural Resources:* A Report by Florida Department of State, Division of Historical Resources, Bureau of Archaeological Research.

[201] Doc. 29C/22 Paris, 5 August 1997 para.35

promote responsible and professional recovery of deep sea historic wreck. The association established a code of ethics, which required members to: conduct themselves in a spirit of fairness and justice in dealings with all other user groups of UCH; acknowledge that all archaeological and historical knowledge derived from any recovery operation belonged to the public; undertake recovery operations in such a way that as much scientific, historical and archaeological data as practically possible is gleaned from the site of the UCH; make all archaeological information available to the scientific, historical and archaeological community as well as the public and to allow the study of artefacts for a reasonable time after their recovery and conservation; use the most advanced technology available in undertaking the archaeological fieldwork in conjunction with recovery; employ a project archaeologist who is to be included in all aspects of planning and execution of an excavation; ensure that prior to excavation, a thorough plan for the excavation and ultimate conservation and disposition of artefacts is drafted and to ensure that no artefacts deemed to be of archaeological or historical significance are ever recovered from any UCH unless funds have been budgeted and made available for their conservation, cataloguing and storage; and to hold out for sale only those artefacts which have been subjected to thorough study and investigation by the project archaeologist. Those items that are deemed to be of irreplaceable archaeological and historical value, and which cannot be photographed, moulded or replicated in a manner that allow future study and analysis, should be kept together in a collection which is available for study by anyone that is interested in conducting legitimate research.

Although some of these points may not be entirely satisfactory to the archaeological community, these ethics certainly indicate an awareness of the archaeological value of UCH among some sectors of the treasure salvage community, and serve as a minimum standard upon which future negotiations in allocating this multiple-use resource can be conducted. There are, therefore increasing signs of co-operation between these user groups of UCH.

Conclusion

There are a number of salient values that can be attributed to the cultural heritage. While the values outlined above apply to all cultural heritage, UCH needs specific consideration. The importance of the UCH as a resource worthy of scholarly study and preservation is of recent origin, and, as an emerging scientific discipline, has yet to gain full recognition amongst those who have an interest in the UCH. Thus, while the values attributed to cultural heritage may conflict, the extent of the conflict in terms of UCH is far greater than that of terrestrial archaeology as there are a greater number of interest groups with a greater diversity of interest. The international nature of UCH has exacerbated these conflicts and obscured the relative importance of some of the attributed values of the cultural heritage.

It is submitted that many manifestation of UCH are of unique archaeological and historical value, that can only be realised through scientific investigation. As such, there is a need to ensure that the physical and contextual integrity of UCH is preserved. Such preservation should be ensured in a way that other attributable values of UCH can continue to be realised, including its economic value. There is thus a need to develop a sound conceptual framework upon which an international regulatory regime can be constructed. Such a regime has been proposed by UNESCO, and will be considered in the following chapters.

Chapter 2

An International Initiate to Preserve Underwater Cultural Heritage

Introduction

Chapter 1 concluded that there exist a number of interest groups in UCH which attribute different values to this finite resource. With the recent emergence of underwater archaeology as a scientific discipline, the archaeological value of the UCH has begun to emerge as the pre-eminent value, threatening to supersede other existing values. This has resulted in a conflict developing between interest groups in UCH in international waters, which requires resolution at international level and the structuring of a management regime to deal with this resource.

With the advancement of technology and the ability of humans to investigate and recover objects from the deep seabed, so the questions arose as to how and who should manage any deep seabed resource. These developments sparked off the reconsideration of the law of the sea, leading in 1982 to a new Convention that delimited State rights and duties with regard to uses of the oceans. Incidentally considered were objects of an archaeological or historical nature found on the deep seabed. At the same time, underwater archaeology in coastal waters was beginning to emerge as a scientific discipline, and so began the process of extending the scope of this discipline to UCH in international waters. The first part of this chapter will consider these developments and the emergence of the principles applicable to UCH in international waters.

The second part of this chapter will introduce the UNESCO draft convention. Recognising that there are items of UCH which require preservation for the benefit of humankind, the question arises as to what exactly will be the subject matter of any future preservation regime. In order to answer such a question, it is necessary to first consider the rationale for introducing such a regime. The rationale informs not only the definition of what will be subject to this differential regime, but also what the scope of this regime might be. This part of chapter 2 will therefore seek to identify the rationale for the convention, and introduce the negotiations concerning the definition of UCH and the scope of the convention.

The development of an international regime to preserve underwater cultural heritage

The development of the discipline of underwater archaeology began as humans first began to access UCH in the relatively shallow coastal waters. As technology developed, access to UCH in deeper waters became possible, as did access to other resources of the deep seabed. The latter initiated a review of the international law of the sea at the same time that questions regarding the management of UCH began to develop. Thus, two important, related negotiations occurred which inform the current UNESCO draft convention. The first concerns the development of substantive principles relating to UCH in international waters during negotiations to conclude UNCLOS, while the second relates to the attempted development of a regional agreement in the Mediterranean to structure a preservation regime for UCH. These developments directly

informed the ILA draft convention that in turn forms the basis upon which the UNESCO draft is constructed.

The 1982 United Nations Convention on the Law of the Sea

UNCLOS provides the only substantive law relating to UCH in international waters. This substantive law is contained in only two articles: 149 and 303. As these article have provided the basis from which all future negotiations have begun, it is important to consider these articles in some depth in order to determine whether they reveal any principles upon which a future regime might be based. Criticisms and various interpretations of these articles will also be considered in order to illustrate the degree of uncertainty which surrounds the implementation of these articles and the need to develop new rules of international law applicable to UCH.

Article 149

In 1968, the Seabed Committee was convened to establish an international authority with jurisdiction over the seabed and ocean floor beyond the limits of national jurisdiction. This authority would regulate, co-ordinate, supervise and control all activities relating to the exploration and exploitation of the seabed resources.[1] In 1970, the Secretary-General submitted a report to the Seabed committee[2], in which it was suggested that "the exploration and recovery of sunken ships and lost objects" could be foreseen as a use of the seabed. The report also stated that although "wrecks, relics and lost objects lying on the seabed are not resources or at least not natural resources, ... they may fall under the jurisdiction of the machinery if the recovery of lost objects is regarded as another use of the seabed." From this initiative evolved article 149, which reads;

> "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin."

This article introduces two key notions concerning the preservation of UCH in international waters. Firstly, that the preservation of UCH, in its broadest sense, is to be undertaken for the benefit of humankind. This notion forms the basis of the UNESCO draft convention, and requires detailed consideration, which is undertaken in chapter 6. Secondly, the notion of preferential rights is introduced.

It had been very difficult to reach consensus on the interpretation of this article, and it is unfortunate that thought these principles were expressed, their substantive meaning were left vague and ambiguous[3]. An important interpretational problem occurs as the convention does not specify the manner in which objects of an archaeological and historical nature are to be 'preserved or disposed of', nor who will provide the necessary

---

[1] 25 U.N. GAOR Supp (No21). See also Barrowman, E., " The Recovery of Shipwrecks in International Waters" *8 Michigan Yearbook of International Law* (1987) p.234

[2] Doc.A/AC.183/23, 25 UN GAOR Supp. No. 21 (A/8021) entitled "Potential Role of the International Machinery to be Established"

[3] See ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) pp.7-10. The ILA International Committee of Cultural heritage Law took a broad interpretation of the duty to preserve UCH as including several activities, such as "maintaining known sites and monuments, excavation of archaeological sites in accordance with accepted standards, conservation and display of material excavated, and dissemination of information obtained."

funding for the preservation or disposal.[4] Preservation may mean *in situ* preservation or placement in a museum, which would obviously require excavation and recovery.[5] Newton argues that 'preservation' connotes delivery from marine peril, as defined in salvage law[6]. Whether UCH is in marine peril is, however, debatable as UCH may reach a stage of harmony with the marine environment, particularly at great depths, and the retrieval of the artefacts may itself be the cause of it's deterioration. Disposal may also be interpreted in a number of ways. As the power of disposal of archaeological and historical objects was originally envisaged to be exercised by the ISBA, it has been argued that 'disposal' may refer to the removal of these objects in order to recover valuable natural resources such as oil or manganese nodules beneath the historical objects.[7] If disposal is to be interpreted to include sale, then it is uncertain as to how the proceeds are to be used to 'benefit mankind as a whole'[8]. This latter phrase itself suffers from interpretational ambiguity. Strati argues that "both the artefacts themselves and the information they provide form part of the common heritage of mankind"[9]. Thus, it is argued that the concept of the common heritage of manind, as proposed for the deep seabed, is applicable to these objects.[10] Therefore, an interpretation of the word 'benefit' may be made in the context of Part XI. The primary benefit of the deep seabed mining provisions under this part are economic, and based on the idea that the economic benefits of mining resources such as manganese nodules are to be divided between all nations, not only those with the technology to mine it themselves. If the benefit of disposal of UCH are viewed as economic, it may mean that artefacts themselves are divided up between nations or that the funds derived from displaying artefacts may be divided up. This, however, presupposes that the economic basis is that of the free-market economy, rather than a socialist economy. As both systems regard the allocation of property rights as benefiting humankind, but on the basis of very different economic models, the extent to which either may apply to UCH is uncertain. It is, however, submitted that within the context of cultural heritage management and protection, 'benefit to mankind' refers to the intangible aspect of learning from these objects and understanding the common past of humankind.[11] The third interpretative problem lies in the 'preferential rights' to be given to a number of alternative states as it is difficult to determine which of the alternative States should have preferential rights.[12]

The lack of an international administrative organ, the uncertainties regarding the possible economic disposition of the UCH and the uncertainties regarding the nationalistic approach taken regarding State preferential rights negates the application of

---

[4] Strati, A., *The protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary law of the Sea* (1995) Martinus Nijhoff Publishers p.300

[5] Migliorino, L., "In Situ protection of the underwater cultural heritage under international treaties and national legislation" 10(4) *International Journal of Marine and Coastal Law* (1995) p.486

[6] Newton, C. F., "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention" 10 *Hastings International and Comparative Law Review* (1986) p.178

[7] Prott, L.V. and O'Keefe, P.J., *Law and the Cultural heritage: Volume 1, Discovery and Excavation* (1984) Professional Book Ltd. p.98; Newton *op.cit* p.180

[8] Dromgoole. S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage in the United Kingdom* (1993) Unpublished PhD Thesis, University of Southampton, p.4-39

[9] Strati *op.cit* p.302

[10] Blake, J.A., *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts with Special Reference to Turkey* (1996) Unpublished PhD Thesis, University of Dundee p.310

[11] Newton *op.cit* p 181

[12] *Ibid.* p.183. See also ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) p.8 and Firth, A.J., *Managing Archaeology Underwater* (1996) Unpublished PhD Thesis University of Southampton pp.157-159. For a more detailed discussion see chapter 3

the concept of the common heritage of mankind to UCH found in the Area. The vagueness and ambiguity of article 149 leaves it with little judicial content. Its inclusion in Part XI, which deals essentially with the deep seabed mining regime, is in itself an anomaly and has led one commentator to question whether its inclusion was a political tactic employed by so-called States-of-origin that wished to advance the recognition of general cultural heritage rights in other maritime zones[13]. Whatever the reason, it may prove to have been insightful as more UCH is being discovered in the deep seabed than might otherwise have thought probable when the convention was concluded.

Article 303

Article 303 reads;

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

This is substantially different from that originally proposed by the Greek delegation at the eighth session in Geneva in 1979, which was to recognise the sovereign right of coastal States to regulate the recovery of UCH on the continental shelf[14]. The result is an irrebuttable presumption in favour of the coastal States that the removal of objects from the contiguous zone[15] would infringe the coastal State's customs, fiscal and sanitary laws as if the recovery took place within the territorial sea. The major maritime nations did not want to broaden the rights of a coastal State in the CZ, and therefore the right to control the recovery of UCH from this zone was defined in terms of existing coastal State rights, namely the rights to prevent and punish infringements of its customs, fiscal and sanitary laws.

Article 303(1) imposes a general 'duty to protect objects of an archaeological and historical nature' which, though introducing the basic preservation principle, is as uncertain and as susceptible to alternative interpretations as 'to preserve' is in article 149. It also calls into question the scope of the States 'duty' to preserve UCH. O'Keefe gives the term 'duty to protect' a wide scope embracing several activities, such as maintenance of known sites and monuments, excavation of archaeological sites in accordance with accepted standards, conservation and display of material, and dissemination of information obtained.[16] It may mean *in situ* preservation, or raising UCH to preserve it from marine peril[17]. This duty, Strati emphasis, is a positive duty

[13] Oxman, B.H., "Marine Archaeology and the International Law of the Sea" 12(3) *Columbia VLA Journal of Law and the Arts* (1988) p.362
[14] Hereafter "CS".
[15] Hereafter "CZ".
[16] O'Keefe, P.J and Nafziger, J., "The Draft Convention on the Protection of the Underwater Cultural Heritage" 25 *Ocean Development and International Law* (1994) p.393
[17] Newton argues that the duty imposed on States under article 303(1) is analogous to the duty to salvage property in marine peril. Newton *op.cit* p.193

which States party to the convention are bound to apply.[18] Migliorino argues that this duty at least implies the obligation not to destroy, damage or mutilate UCH, and advocated a presumption that the duty will imply *in situ* protection.[19] However, as the convention does not specifically define the State's duty, there is, in the absence of any other international convention prescribing State's duties, no basis upon which preservation measures can be defined. As article 303(1) applies to all maritime zones, the exercise of this duty to preserve must be confined within the limits of the jurisdictional framework of UNCLOS. Thus, this duty will not allow the coastal State to extend its jurisdiction beyond its territorial waters.

Article 303(2), it is argued, amounts to a rule of law; a true legal fiction rather than a rule of evidence[20]. Any UCH recovered in the CZ will be presumed to result in an infringement of the customs, fiscal and sanitary laws in the coastal State's territory or territorial sea. This would mean that the recovery itself must be presumed to have occurred in the territory or territorial sea[21]. If this presumption were rebuttable, then any State involved in the recovery of UCH from the CZ would only have to prove that they were in fact recovered from this zone to evade the coastal State's jurisdiction. This result would appear to completely defeat the very purpose of including article 303 in the convention. Strati therefore argues that this presumption must be an absolute presumption[22]. Similarly Oxman argues that article 303 must be regarded as a rule of law.[23]

To have simply presumed that the recovery of UCH in the CZ is tantamount to recovery in the territorial sea would have allowed the coastal State to treat the UCH in exactly the same manner as it does UCH actually found in the territorial sea. However, this would have resulted in an expanded set of coastal laws applying to activities in the CZ. In order to ensure that this was not the case, the coastal laws applicable were restricted to those already recognised in article 33, namely the coastal States customs, immigration, fiscal and sanitary laws. The presumption is therefore extended so that this recovery would also be presumed to have infringed these laws. It is, however, uncertain whether this presumption is rebuttable, nor is it clear exactly what the scope of these laws are. If it were rebuttable, the recovering State could rebut this presumption by adducing evidence that the recovery was not in fact an infringement of the coastal State's customs, fiscal or sanitary laws. Dromgoole argues that only in cases where the UCH is imported or exported is there likely to be an infringement of these laws and that the sanitary and immigration regulation would unlikely be applicable at all[24]. Therefore the laws applicable would be narrowly construed so that only the traffic in UCH found in the CZ could be regulated by the coastal State. This would be consistent with the limited function of the CZ. Thus, it is submitted that the coastal State will have to enact

---

[18] Such State duties may include the provision in national legislation for the following; (i) the obligation for finders of UCH to report the finds to the competent archaeological authorities; (ii) the obligation on the State to take the necessary interim protective measures for the preservation of UCH, even if this involves the suspension of construction projects; (iii) the need to preserve the finds *in situ* and to avoid unnecessary excavation; (iv) the need for conservation, proper presentation and the restoration of the recovered items. Strati *op.cit* p.124

[19] Migliorino (1995) *op.cit* p.486

[20] Caflish, L., "Submarine Antiquities and the International Law of the Sea" 13 *Netherlands Lawbook of International Law* (1982) p.20

[21] See Strati *op.cit* p.194 fn.47

[22] *Ibid* p.166. Caflish argues that in order for the presumption to be rebuttable, article 303 would have had to explicitly state that the presumption was rebuttable, and would apply "unless the contrary is proved". Caflish *op.cit* p.20

[23] Oxman (1988) *op.cit* pp.353-372

[24] Dromgoole *op.cit* p.4-45

legislation conforming to the scope of its customs and fiscal legislation that regulates the traffic in UCH. The effect of article 303 would therefore appear to be a *de facto* extension of the coastal States limited legislative jurisdiction over the CZ.

Other commentators do not share this view. Alexander argues that the coastal States 'custom, fiscal and sanitary laws' should be extensively construed so as to include the coastal State cultural heritage regulations.[25] This, in effect, would make it difficult to rebut this presumption. Strati goes one step further and argues that this presumption must be irrebuttable in order for it to be effective. [26] Article 303(2) relates to the 'removal from the seabed' of UCH and will not cover activities such as diving on a wreck, filming a wreck, or in some way damaging a wreck[27]. It may be that a State will therefore have the right to search for archaeological sites in the coastal States' CZ, but would have to seek permission before recovering any finds. It has, however, been maintained that the obligation to preserve in 303(1) should, at least imply that there is a duty not to damage or destroy UCH in the CZ.[28] Strati argues that as the coastal State is the only state that can regulate the removal of objects from the CZ, it can impose any conditions it feels necessary to comply with its duty under article 303(1) to preserve UCH in this zone (subject to articles 303(3) and (4)), and may therefore be able to extend its cultural heritage laws over the CZ. This would include not only coastal State jurisdiction over the recovery of UCH, but also the search for such objects. Strati therefore argues that the effect of article 303 is that it establishes an archaeological zone[29] which is not necessarily dependent on the coastal State having declared a CZ.[30]. The reasons advanced are that article 303 forms part of the General Provisions of the convention and not part of the convention dealing specifically with the CZ, and may therefore give rise to rights and duties under the convention not specifically related to the CZ. The rights a coastal State has over the recovery of UCH in the CZ are therefore considerably broader than the mere policing rights a coastal State has in respect of the general CZ zone as laid down in the section on the CZ in the Convention[31]. The fact that the CZ is referred to in article 33 and not specifically referred to in article 303 would appear to reinforce this conclusion[32].

---

[25] For example, Alexander concludes that in the US, the custom, fiscal and sanitary laws would include the Marine Protection, Research and Sanctuaries Act 16 U.S.C (1985), the National Historic Preservation Act 16 U.S.C (1985), President Reagan's Proclamation on the Exclusive Economic Zone (No. 5030 48 Fed. Reg 10650 1983), the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 10 I.L.M 289, the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage 1037 U.N.T.S. 151, and the law of salvage. Alexander, B.E., "Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations" 20(1) *Journal of Maritime Law and Commerce* (1989) pp.7-8

[26] Strati *op.cit* p.167

[27] Newton *op.cit* p.187 and Dromgoole o*p.cit* p. 444

[28] Migliorino o*p.cit* p.486

[29] Strati *op.cit* p.168; Only two States have extended their heritage legislation over the contiguous zone, France; Act Concerning Marine Cultural Property 89-874 of 1 December 1989, and Tunisia; Protection of Archaeological Property, Historic Monuments and Natural Urban Sites Law No. 86-35 of 9 May 1988; Strati *op.cit* p.210. Arend, believes that this does not create an archaeological zone, and quotes Oxman in support of this conclusion. See Arend, A. C., "Archaeological and Historical Objects: Implications of UNCLOS III" 22 *Virginia Journal of International Law* (1982) p.799. However, Caflish agrees with Strati's conclusion that, in effect, an archaeological zone has been created. See Caflish *op.cit* p.20

[30] For a discussion on the delimitation of the contiguous/archaeological zone, and possible conflicting jurisdiction between opposite or adjacent zones, see Strati *op.cit* p.183 - 184

[31] It is notable that both the French and Tunisian Legislation extending State jurisdiction over UCH in the CZ are contained in the State's heritage legislation and not mentioned in the legislation declaring the CZ. Strati *op.cit* p.185

[32] Nordquist states that "the words 'in applying article 33' may appear to be ambiguous, but probably, in the light of the legislative history, do not require the coastal state to assert any rights of control under

It is submitted that the creation of an archaeological zone would be an unduly liberal interpretation of article 303 given the coastal State's limited jurisdictional competence in terms of the CZ. The reference to the CZ would not merely define its geographical scope. Migliorino argues that a broad interpretation of article 303(2) is unjustified as, if the conference had intended to allow the coastal State to extend its national jurisdiction over the CZ, "a clearer legal solution would have been to assert the jurisdiction of the coastal state over such objects without resorting to the 'legal fiction' of article 303(2)".[33] It would therefore appear that although article 303(2) does amount to a rule of law, enabling the coastal State to extend its control over the recovery of UCH situated in the CZ, this control must be narrowly construed and be limited to the recovery of UCH and cannot be construed as creating an archaeological zone. The reference to coastal State's existing rights in the CZ (policing of customs, fiscal and sanitary laws) to define the coastal State's rights to control recovery operations must entail the existence of these extended rights, which will only arise if the coastal State has declared a CZ. The coastal State can only control traffic by applying article 33, which it can only do if it has declared a CZ. The recognition of an archaeological zone will undoubtedly lead to problems regarding jurisdiction in those areas where the relative proximity of States will lead to overlapping archaeological zones. As the convention does not specifically provide for this zone, it will only be able to solve such problems by assimilating this zone with the CZ. Therefore, in order to make use of the conventions CZ delimitation provisions, the States will have to claim a CZ.

Article 303(3) states that "nothing in this article affects the law of salvage or other rules of admiralty[34], or laws and practises with respect to cultural exchanges." A State is, according to article 303(1) under a duty to preserve these objects. A conflict is therefore likely to arise between the application of salvage law and coastal State jurisdiction over the recovery of UCH from this zone. There is an inherent conflict between article 303(2) and 303(3), in that salvage law does not require prior permission to undertake salvage operations, unless the operation is to take place within a coastal States territory and the coastal State has legislated to that effect. If the coastal State could interpret article 303(2) so as to extend its legislative competence over the CZ, then arguably, the application of salvage law would have to be subject to the coastal State's laws. If, however, article 303(2) cannot be interpreted so as to extend the coastal States laws over the CZ, then it would result in salvage law being applicable, and ultimately depriving a coastal State of an effective way to prevent the recovery of UCH from the CZ. Presumably, this salvage or admiralty law that is to apply is that of the coastal State. If a flag State's admiralty or salvage law were to apply, the fiction created in article 303(2) would be ineffective.[35] Therefore, if a coastal State has entered a reservation in terms of article 30 of the 1989 London Salvage Convention, then it need not apply salvage law to UCH, and therefore no conflict will necessarily develop[36]. Presumably, therefore, a conflict will only develop if a coastal State has not reconciled its salvage law and UCH law.

---

article 33 in exercising its rights under article 303." Nordquist, M.H., *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. 5 (1989) Martinus Nijhoff Publishers p.161

[33] Migliorino, L., "Submarine Antiquities and the Law of the Sea" 4(4) *Marine Policy Reports* (1982) p.4

[34] The term 'admiralty law' is peculiar to Anglo-Saxon law, and was translated from the original English into the other official languages using terms which would indicate that what was meant was 'commercial maritime law'. Nordquist *op.cit* p.160

[35] Migliorino (1982) *op.cit* p.4; Caflish *op.cit* p.21

[36] To date only 8 countries have entered a reservation not to apply the Convention to UCH.

Strati argues that if objects of an archaeological and historical nature can be defined as those which have been submerged for more than 100 years, this definition could be used to remove the inconsistencies evident in article 303, in that the application of salvage law would apply only to those recovery operations of objects which have been submerged for less than 100 years.[37] This is supported by Arend, who states that "by explicitly excluding from its reach objects covered by the law of salvage, article 303 avoids the confusion that might result if the provisions dealing with archaeology were applicable to objects with identifiable owners."[38] Similarly, Strati states that this conclusion will solve the problem of articles 149 and 303 interacting in the 'Area'. Article 149, it is argued, is an expression of the duty to preserve UCH found on the seabed required by section 303(1). This would therefore apply to all UCH older than 100 years, while article 303(3) would apply to the recovery of all UCH that have been underwater for less than 100 years. However, there has been no indication that admiralty courts will limit the application of salvage law to UCH of any specific age. In fact, admiralty courts have jealously guarded their jurisdiction to apply salvage law to UCH of any age[39].

A further problem arises with the scope of article 303 in that instead of including article 303 under Part II of the convention dealing with the CZ, it was included under Part XVI of the convention dealing with general provisions, which applies to all maritime zones created by the convention, irrespective of the coastal State's jurisdiction.[40] This causes significant uncertainty as to the scope of article 303. If article 303 (1), (3) and (4) apply to all maritime zones, it will overlap with the provisions of article 149 with regard the 'Area'. Both Newton[41]and Migliorino[42]believe that as article 149 was drafted earlier than 303 and applies to the 'Area', the intention was for article 149 to apply exclusively to the 'Area', and article 303 exclusively to the CZ[43]. In view of the fact that the US proposal had been an attempt to limit coastal State jurisdiction in article 303 to the CZ, it would seem that Newton and Migliorino's arguments can be sustained. It would also appear that the reasons for including article 303 under the General Section rather than the section on the CZ was because the negotiating parties would have had to reopen negotiations on the CZ, which at that stage of the proceedings, had been completed and closed. The *travaux préparatoires* would therefore reveal that the intention of the negotiating parties might not necessarily have been to apply article 303 to all the maritime zones, but rather be interpreted to apply exclusively to the CZ. However, this would mean that there was no provision for preservation of UCH on the CS or in the exclusive economic zone[44]. Both Dromgoole[45] and Oxman[46] regard article 303 (1) (3) and (4) as applying to all the maritime zones, and only article 303(2) applying to the

---

[37] Strati *op.cit* pp.171-173 and 182

[38] Arend *op.cit* p. 801

[39] See Brice, B., "Salvage and the Underwater Cultural Heritage" 20(4) *Marine Policy* (1996) pp.337-342

[40] Hayashi, M "Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea" paper presented at the Conference on the Protection of Underwater Cultural Heritage, National Maritime Museum, London 3-4 February 1995

[41] Newton *op.cit* p.187

[42] Migliorino (1995) *op.cit* p.485

[43] It would appear that Nordquist also regards article 303 as applying exclusively to the CZ, as he states that "beyond the 24 nautical miles, the coastal state has no particular standing under this Convention." Nordquist *op.cit* p.161

[44] Hereafter "EEZ". It is interesting to note that in its "Response to UNESCO concerning the ILA draft Convention on the protection of the Underwater Cultural Heritage", Germany noted that this would "bridge the gap between the areas of application of Article 149 and 303." Doc. 28C/39 Add., Paris, 31 October 1995 Annex. p. 1

[45] Dromgoole *op.cit* p.4-42

[46] Oxman (1988) *op.cit* p. 362

CZ[47]. Strati also argues that the duty to preserve UCH precedes the article which would refer to the CZ, and must therefore be a duty of general application. Article 303 would therefore apply to all the maritime zones.[48] The fact that article 303(1) imposes a duty to protect archaeological and historical objects 'found at sea' would reinforce the conclusion that articles 303(1), (3) and (4) apply to all the maritime zones. If this is the case, then all the maritime zones would be covered, but would result in both article 303 (1), (3) and (4) and article 149 applying to the 'Area'. A potential conflict could arise if both article 149 and 303 apply in the 'Area'. Dromgoole explains that as article 303 specifically retains the law of salvage, UCH may have to be disposed of in order to pay the salvage award. However, article 149 specifies that the disposal shall be for the benefit of mankind as a whole, which may not be achieved if the articles are disposed of for the salvage award.[49] However, Strati argues that as article 303 falls under Part XVI, the general provisions, and applies to all the maritime zones, whereas article 149 applies specifically to the Area, then as regards the preservation of UCH found on the seabed, article 149 will have preference under the principle *lex specialis derogat legi generali.* However, this conclusion is not supported by Caflish.[50]

Article 303(3) also states that "nothing in the article effects the rights of identifiable owners". The effect of the sinking of a vessel on the owner's rights will be determined by national legislation. In most States, an owner will not lose his proprietary rights to a vessel when it sinks. He may, however, expressly abandon all his rights to the vessel, leaving it ownerless (*res nullius*). Abandonment can be difficult to prove, as most jurisdictions require the owner to have physically abandoned possession of the vessel and, more problematic, have had the intention to abandon the vessel.

Section 4, has been described as article 303's saving grace, as it "leaves the way open for specific agreement on the underwater cultural heritage".[51] It was intended that article 303(4) would harmonise the rules of the law of the sea with regard to UCH with the content of the emerging law of archaeology and cultural heritage[52]. It is in terms of this provision, that a more comprehensive convention to preserve UCH is being considered by UNESCO.

It is evident that in an attempt to reach consensus and produce a convention, the substantive provisions of articles 149 and 303 were left vague and ambiguous, which is really not surprising as their drafting was inconsequential compared to the major issues of the Third United Nations Conference on the law of the Sea[53] At a Conference on the preservation of UCH, held at the National Maritime Museum in February 1995, delegates attempted to formulate an understanding of articles 149 and 303 that States could agree upon. However, the delegates felt that these articles "did not have sufficient

---

[47] Caflish agrees with this conclusion. See Caflish *op.cit* p.25, as does Watters, D. R., "The Law of the Sea and Underwater Cultural Resources" 48 *American Antiquity* (1983) p.813

[48] Strati *op.cit* p.169: Blake however argues that article 303 applies exclusively to the CZ, and that a gap in the preservation cover of article 149 and 303 to preserve UCH therefore exists in the area of the CS and EEZ. See Blake *op.cit* pp.89-95

[49] Dromgoole o*p.cit* p.4-44

[50] Strati *op.cit* pp.312 and 324 fn.59; Caflish *op.cit* pp.3-32

[51] Prott and O'Keefe (1984) *op.cit* p.105. See also ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) p.8, in which this interpretation of article 303(4) is described as one which "should encourage the work of this committee".

[52] Oxman (1988) *op.cit* p. 364

[53] Hereafter "UNCLOS III". Caflish *op.cit* p.20. Prott and O'Keefe believe that the lack of archaeological expertise at the drafting of these articles contributed to the provisions being vague and ambiguous. See Prott and O'Keefe (1984) *op.cit* p.104

substance to justify a valid and agreed interpretation as a basis for an implementation agreement."[54]

Yet, these articles do represent the only substantive international law applicable to UCH, and contain general applicable principles[55]. Firstly, while vague and ambiguous, it is evident that States do have a duty to protect or preserve UCH in various maritime zones beyond coastal State jurisdiction. Secondly, this duty is undertaken for the benefit of humankind[56], and thirdly, in fulfilling these duties, States are duty bound to co-operate. These general principles form the basis upon which the UNESCO draft convention is structured.

The European initiative

During a debate in the Parliamentary Assembly of the Council of Europe concerning the negotiations at UNCLOS III, it was noted that due to the political and economic concerns of the negotiators, the question of preservation of UCH was likely to receive little attention and therefore be general and superficial.[57] The Council's Committee on Culture and Education examined the issue and prepared a report that included Recommendation 848.[58] This recommendation required the Assembly to recommend that the Council of Ministers draw up a draft European convention, and urged member governments to revise their existing legislation to comply with certain minimum recommendations included in the report.

Recognising that articles 149 and 303 did not adequately define the UCH to be preserved, the first recommendation was that the definition of UCH should extend to what is included in land heritage legislation to ensure that there were no gaps in the preservation regime and should cover all objects more than 100 years old, with a discretion to include more recent objects of historical importance. The second recommendation corresponded to recommendations made at the time by Greece at UNCLOS III that national jurisdiction over UCH should extend to a 200-mile limit. The third recommendation was that existing salvage law should not apply to UCH. The introducing of this recommendation reflected the growing disparity between the regimes of salvage law and cultural heritage law in the Mediterranean, and the introduction of the principle of non-economic utilisation of UCH which features so prominently in the UNESCO draft convention.[59]

---

[54] Summary Report of the National Maritime Museum Conference on Protection of Underwater Cultural Heritage, Greenwich 3-4 February 1995

[55] Strati *op.cit* pp. 330-334 includes a summary of the positive and negative factors of the inclusion of articles 149 and 303 in UNCLOS.

[56] Arend regards article 149 as applying the concept of the common heritage of mankind to UCH. Arend *op.cit* p.800. Caflish, however, regards article 149 as having abandoned the principle of the common heritage of mankind by failing to designate an authority to control the recovery of objects of an archaeological and historical nature, and abandoning the application of article 149 to each individual state. See Caflish *op.cit* p.31

[57] Dromgoole (1993) *op.cit* p.4-1

[58] Doc. 4200-E, Strasbourg, 1978.

[59] Other recommendations included: (1) the drawing up of a European Convention and the setting up of a European Group for Underwater Archaeology; (2) a single authority to be given primary responsibility for dealing with land and underwater heritage finds; (3) provision to be made for appropriate enforcement measures; and (4) a determination of the minimum legal requirements that should be incorporated into national legislation.

In 1982, the concerns of the Council of Europe were realised when UNCLOS III concluded, and the preservation measures contained in the new convention were restricted to two articles that did not address any of the recommendations that the Council had considered necessary. Acting on recommendation 848, an *ad hoc* Committee of Experts was appointed to draft a European Convention on the Protection of the Underwater Cultural Heritage[60], which was submitted to the Committee of Ministers in March 1985.[61] Recommendation 848 was unfortunately an ambitious recommendation, and when it came time to produce a convention, which would ultimately bind member States of the Council of Europe, many of the principles of Recommendation 848 were to be sacrificed in order to reach consensus. The regime proposed was limited so as to comply with that established in UNCLOS.[62] Unfortunately, on submission of this draft, a controversy arose between Greece and Turkey concerning territorial application, and Turkey's subsequent refusal to endorse the draft has not been resolved. Until the draft is signed, the final version and all related documents remain confidential and unavailable for public dissemination, and so it is difficult to ascertain what will become of this draft.

The International Law Association initiative

In 1988, the ILA formed a Committee on Cultural Heritage Law. As its first task, the Committee reviewed the preservation measures for UCH in international waters, and concluded that a convention was needed to overcome the difficulties apparent in the provision of UNCLOS. The committee regarded section 303(4) of UNCLOS as authorising the drafting of a new convention and that such a step would fulfil State

---

[60] Doc. CAHAQ(85)5, Strasbourg, 23 April 1985.Hereafter "1985 European draft convention"

[61] The 1985 European draft convention on the Protection of the Underwater Cultural Heritage was an attempt to implement the recommendations made in recommendation 848. In particular, the definition of the UCH is broad enough to cover a wide range of objects. The definition is qualified in that, in order to be protected the UCH must be at least 100 years old. (article 1) The preservation measures provided for in the draft convention include; the requirement that, as far as possible all preservation measures should be undertaken to preserve the UCH *in situ* (article 3); that where authorisation is given to private persons to survey or undertake recovery operations, these persons have the appropriate qualifications and suitable equipment (article 5); the compulsory reporting to competent authorities of UCH finds, and that the finders, as far as possible, leave the UCH undisturbed where it was found (article 6); that contracting States ensure that all scientific information concerning the survey, excavation, recovery or conservation of UCH is made available as soon as possible in appropriate publications (article 7); that where a State has a particular interest in the UCH situated in another State's territory, the interested State is considered by the host State and collaboration undertaken in the surveying, excavation or recovery of the UCH (article 9); that States undertake to make available any information concerning the unlawful export of UCH (articles 11 and12) and for its possible restitution to the State from whose territory it was illegally excavated (article 13). A contracting State may also require its nationals to report to its competent authority any discoveries of UCH found outside the jurisdiction of any State (article 15).This provision would have had an imported effect in the preservation of the UCH in international waters, in that, although it may not have had any effect in protecting the site *in situ*, at least it would have required the finders to notify the State of its existence, after which the State may be in a position to preserve the site by restricting the importation of UCH excavated from the site into its territory, and so provide some measure of preservation.

[62] For example, article 2, which substantially mirrors article 303 of UNCLOS, states that; "[o]utside its territorial sea, within the maritime zone which does not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured, each Contracting State may exercise the control necessary to prevent and punish infringements within its territory or territorial sea of its laws and regulations relating to the protection of the underwater cultural property. Each contracting state may, in applying paragraph 2 {above} presume that removal of underwater cultural property from the seabed in the zone referred to in that paragraph without its approval would result in an infringement within its territory or territorial sea of its laws and regulation." See Dromgoole *op.cit* p.4-21.

Parties' duty as required by section 303(1). The committee produced its final draft in 1994, which was adopted at the 66th Conference in Buenos Aires that year[63].

The ILA approach to the problem of preserving UCH was characterised by three specific strategies that substantially mirrored those in Recommendation 848. Firstly, the UCH to be preserved was only that which its owners had abandoned, thus attempting to avoid any problems related to private property rights. Secondly, the preservation regime was based on coastal State jurisdiction, which was extended up to 200nm from the baseline by the discretionary creation of a cultural heritage zone; and thirdly, traditional admiralty salvage law, which has hitherto been applied to UCH in international waters, was to be excluded. Annexed to the draft was the Charter on the Protection and Management of Underwater Cultural Heritage[64] produced by the International Council of Monuments and Sites[65], which sets out benchmark standards for underwater archaeology. As the ILA is a non-governmental organisation, it considered UNESCO to be the most appropriate organisation to adopt a convention, and the final draft was forwarded to UNESCO for consideration.

Conclusion

These three instruments, and the principles derived therefrom, have formed the basis for the UNESCO draft convention. As such, these will be referred to, compared and explained where pertinent to the UNESCO draft. The following section will outline and explain the provisions of the UNESCO draft convention and State responses to these proposals An analysis and evaluation of the draft and its similarity to, and the results of it being a product, of these previous instrument, will be considered in chapter 5.

The UNESCO draft Convention on the Protection of the Underwater Cultural Heritage

The UNESCO initiative

At a UNESCO regional Seminar on the Protection of Movable Property held in Brisbane in 1966, a statement was issued on the preservation of the UCH which concluded that "if positive steps are not taken immediately it is anticipated that the recent advances that have been made by treasure hunters internationally ... will result in a tragic loss of essential and important heritage[66]. Surprisingly, considering the perceived urgency to take positive steps to preserve UCH, it was only in 1993 that the Executive Board of UNESCO requested the Director-General to undertake a feasibility

[63] For a detailed discussion of the ILA draft, see O'Keefe, P.J., "Protection of the Underwater Cultural Heritage: Developments at UNESCO" 25 *International Journal of Nautical Archaeology* (1996) pp.169-174; Blake, J., "The protection of the underwater cultural heritage" 45 *International and Comparative Law Quarterly* (1996) pp.819–843

[64] Hereafter referred to as "the ICOMOS Charter". The ICOMOS Charter was ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, from 5-9 October 1996.

[65] Hereafter "ICOMOS". Established in 1964 ICOMOS is a non-governmental organisation with special observer status at UNESCO, and whose primary function it is to advise Intergovernmental organisations of the steps necessary to conserve the monuments and sites of the world. See www.icomos.com

[66] The need for an international convention to preserve UCH was also identified by a number of commentators, including Korthals-Altes in 1976. See Korthales-Altes, A., "Submarine Antiquities: A Legal Labyrinth" 4 *Syracuse Journal of International Law and Commerce* (1976) pp.77-97

study to consider adopting a new international convention on the preservation of UCH[67]. The Director-General noted the work undertaken by the ILA Cultural Heritage Law Committee on producing a draft Convention, and decided to wait until a final ILA draft was completed before submitting the feasibility study to the Executive Board of UNESCO.[68] Whilst preparing this feasibility study, it became apparent that a number of crucial issues would need further investigation, and that the ILA draft convention, though providing a useful basis for consideration of a new convention, was inadequate and would need substantial amendment. The feasibility study was evaluated by the UNESCO Executive Board in March 1995, who considered it necessary to convene a meeting of experts to consider the ILA draft in greater depth[69]. It was decided to pursue the drafting of a new convention, and the Director-General was invited to undertake further discussions with the United Nations[70], the International Maritime Organisation[71] and the ILA; to convene the meeting of experts proposed by the Executive Board and to consider States' comments. The meeting of experts was convened in May 1996[72], and the results submitted to the Executive Board[73]. The need for such a convention was unanimously accepted at the meeting of experts, and in August 1997, the General Conference directed the Director-General to prepare a first draft of an international convention[74]. This draft was completed in April 1998[75] and was considered by a meeting of Governmental experts in Paris from 29 June to 2 July 1998[76]. Although this meeting identified areas of agreement, a number of issues remained unresolved, and it was unanimously agreed that a second, and possibly a third meeting of experts was needed before a draft could be submitted to the General Assembly for adoption.[77] The second meeting of experts was held in Paris from 19 to 24 April 1999[78] at which State representatives were able to actively contribute to the redrafting of the draft convention[79]. In July 1999, a revised draft was produced which reflected State participation in the negotiations, and which formed the basis for the third meeting of experts held in July 2000.[80]

Although it had initially been hoped that a draft would be submitted to the 30th Session of the General Conference in November 1999, the difficulties in obtaining broad consensus prevented this. This has resulted in a further resolution of the General Assembly that the Executive Board should continue negotiations with the hope of reaching consensus in time for a draft to be submitted to the 31st General Conference in 2001 for consideration.

---

[67] Doc. 141 EX/18 Paris, 23 March 1993, Resolution 5.5.1 para.20
[68] Clément, E., "Current Developments at UNESCO concerning the protection of the underwater cultural heritage" 20 *Marine Policy* (1996) p.311
[69] Doc. 146/EX27, Paris, 23 March 1995
[70] Hereafter "UN"
[71] Hereafter "IMO". The IMO is the specialised agency of the UN responsible for international maritime matters.
[72] CLT-96/CONF.605/6 Paris, 22 - 24 May 1996. Hereafter "1996 meeting"
[73] Doc. 151EX/ Decisions Paris, 3 July 1997,
[74] Doc. 29C/22, Paris, 5 August 1997.
[75] CLT-96/CONF.202/5 Paris, April 1998. Hereafter referred to as "the secretariat draft"
[76] CLT-98/CONF.202/7, Paris 29 June – 2 July 1998. Hereafter "1998 meeting".
[77] CLT-98/CONF.202/7, Paris 29 June – 2 July 1998 p. 14
[78] CLT-99/CONF. 204, Paris, August 1999. Hereafter "1999 meeting".
[79] CLT-96/CONF.202/5 Rev.2, Paris, July 1999. Hereafter referred to as "the negotiating draft".
[80] CLT-96/CONF.202/5 Rev.2, Paris, July 1999. Hereafter "2000 meeting".

Rationale and principles of the UNESCO draft convention

The rationale and underlying principles of the UNESCO draft convention can be found in the substantive general principles articulated in article 3, read and interpreted together with the preamble[81]. The substantive general principles are of the utmost importance, as they shape the regime for preservation and provide a point of reference for the interpretation of the substantive articles of the convention. Although the preamble does not, in itself constitute a substantive part of the convention, it is important in any international agreement as it provides the determining context for the interpretation of its provisions.[82]

The UNESCO draft convention provides, in article 3, for the general principle, which reads[83];

"States Parties shall preserve the underwater cultural heritage for the benefit of humankind in accordance with the provisions of this Convention"

The interest of humankind arises from the acknowledgement, in the preamble, of;

"the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage"[84]

The preamble goes further by declaring;

"that the underwater cultural heritage should be preserved for the benefit of humankind, and that therefore responsibility for its protection rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law."[85]

There is therefore a recognition that the threat to UCH is a global threat, and that the preservation of UCH is a necessity which States must undertake in the interests of humankind. However, there is nothing in the structure of the convention which reflects

---

[81] The preamble has changed little from the ILA draft, which had been based to a large extent on the 1985 European draft convention.

[82] Article 31(2) of the 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, states that a treaty is to be interpreted in good faith in accordance with its context, which includes, in addition to the text, its preamble and annexes.

[83] The UNESCO general principle is a great deal broader than that of article 149. Firstly, the general principle is one of preservation and not preservation OR disposal. Disposal is no longer regarded as an alternative to preservation, but rather subject to it. (CLT-99/WS/8, Paris, April 1999 p.24) Secondly, no reference is made to the preferential rights of certain States. In light of the problems in interpretation of these terms in article 149, this omission is welcome. The concerns of States with an historical or cultural interest may be taken into consideration in other articles of the convention, including the proposed articles on co-operation, notification, disposition and on collaboration and information sharing. Thirdly, unlike article 149, the UNESCO general principle does not apply to the area, but to all maritime zones dealt with in the convention.

[84] Turkey proposed that the term 'shared heritage' should be changed to 'common heritage' CLT-99/CONF.204/5, Paris, April 1999. Egypt reiterated this proposal. CLT-2000/CONF.201/3, Paris, April 2000 p.3

[85] The ILA draft convention contained a similar paragraph, though the UCH was seen as belonging to the common heritage of mankind. The use if such proprietary terms certainly suggest that perhaps the international community, as the representation of humanity, could acquired definite rights and duties. The ILA draft convention preamble stated "that the underwater cultural heritage belongs to the common heritage of humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law."

the changing nature of sovereignty in international law, nor recognises the interest of the international community as distinct from that of States. The interest of humanity referred to are not given any legal basis in the convention, and amount to nothing more than statements of aspirations. It is unfortunate that the substantive provisions of the convention do little to clarify the meaning of the term 'benefit of mankind'. The term is certainly similar to the principle contained in article 149 of UNCLOS and in line with that, evident in a number of international conventions that aim to preserve the terrestrial cultural heritage, such as the 1970 UNESCO Convention[86], the 1972 World Heritage Convention[87], and the 1995 UNIDROIT Convention[88]. Reference to humankind is, however, controversial. While the Egyptian delegation wished to alter the wording from 'shared heritage' to 'common heritage', the Canadian delegation preferred not to include the term heritage, and in fact considered this general principle as unnecessary in its entirety[89]. Whether any of these terms amount to anything more than political statements or reflections of the principle of State co-operation is uncertain, and considered in greater detail in chapter 6.

The perceived need for a convention is clearly set out in the preamble, which indicates the threats to UCH. These include those emanating from uses of the oceans, such as activities related to the exploration and exploitation of the natural resources of various maritime zones, construction of artificial islands and the laying of submarine cables and pipelines[90]. Most urgent, however, is the threat to UCH,

"by unsupervised activities not respecting fundamental principles of underwater archaeology and the need for conservation and research of underwater cultural heritage."

Removal of UCH from its context unnecessarily, and without having taken the appropriate recording of all details *in situ*, leads to a deprivation of archaeological knowledge, and possibly damage to the recovered artefacts[91]. It is therefore the aim of

---

[86] 10 I.L.M 289. The Convention aims to protect an individual State's cultural heritage, recognising that source countries have lost a great deal of their cultural heritage through illicit activities. The preamble specifically requires a State to protect the cultural heritage situated in its territory and recognises the importance of the cultural heritage as 'a basic element of national culture'. Yet the preamble also has traces of a universal perspective to the cultural heritage in recognising that the national culture is a basic element of civilisation, and that "cultural exchange between nations is necessary for scientific, cultural and educational purposes which increases the knowledge of the civilisation of Man, enriches the cultural life of all people and inspires mutual respect and appreciation among nations."

[87] 1037 U.N.T.S. 151. The World Heritage Convention recognises that certain cultural heritage is of significance to humankind as a whole, irrespective of where it is situated. The preamble states that the "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world" and "that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole".

[88] The preamble to the UNIDROIT convention includes the following paragraph: "Convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation".

[89] CLT-2000/CONF.201/3, Paris, April 2000 p.7

[90] The preamble states that "Conscious also of growing threats to underwater cultural heritage from various other activities namely exploration of natural resources of various maritime zones, constructions, including construction of artificial islands, installations and structures, laying of cables and pipelines;" CLT-96/CONF.202/5 Rev.2 Paris, July 1999 p.1. The International Cable Protection Committee has, however, argued that an activity such as the laying of cables is not a threat to UCH. This sentiment is supported by Canada, which considered that this paragraph in the preamble unduly labels as "growing threats" activities such a laying cables" CLT-2000/CONF.201/3, Paris, April 2000 p.3

[91] UNESCO's concern regarding UCH was expressed in 1997, in which a UNESCO report stated that "[t]he recent accessibility of underwater wrecks, due to the widespread use of Self-Contained Underwater

the convention to introduce the principle of preservation *in situ.*[92] The preamble acknowledges that it is in the interest of all nations and all people that recovery operations are conducted in a scientific manner so as to best preserve the archaeological information that can be garnered from the investigation of UCH and that can advance the knowledge of humanity[93]. The application of the principle of *in situ* preservation, and the application of scientific techniques to any activity directed at UCH will naturally ensure that the archaeological information of UCH is preserved. What is of concern to the international archaeological community is that many of the activities that have an impact on UCH, including some commercial recovery operations, are not undertaken in accordance with acceptable standards of underwater archaeology. It is the primary task of the convention to introduce a set of archaeological standards as benchmarks for excavation activities, which are based on those proposed by ICOMOS.[94] Thus, the primary thrust of the rationale is the preservation of UCH, in terms of its physical integrity and the archaeological value which it embodies. Few would argue that these are not commendable and timely proposals. This, however, is not the sole rationale for developing an international convention. An activity which has concerned underwater archaeologists for some time, and which has not necessarily respected the fundamental principles of underwater archaeological excavation is the recovery of UCH by treasure salvors. The preamble therefore includes the following paragraph;

"[a]ware further of increasing commercialisation of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks".

The inclusion of this paragraph in the preamble introduces the archaeological ethos that commercial recovery of UCH is incompatible with the preservation of this resource. This paragraph does not, however, make this explicit, although the convention itself certainly does[95]. The convention is not simply concerned with the preservation of the archaeological value of UCH, or simply the physical preservation of the cultural heritage so as to realise the former value, but also to eliminate recognition of the economic value of UCH. As such, the convention is headed as a convention to 'protect' UCH rather than simply 'preserve' it; the former implying consideration of a regime

---

Breathing Apparatus (SCUBA), has been followed by severe looting. As early as 1974 a study made for the Turkish authorities stated that there were no classical age wreck examined off the coast of that country which had not been interfered with, in other countries, divers had used explosives to break up wrecks and make bullion readily accessible. In yet other cases, holes had been blasted in the wreck area by using 'prop-wash' without regard for proper survey or mapping, thus destroying information, which could have been retrieved by scientific investigation and also destroying many artefacts, such as old ships' timbers, of great importance to the archaeological record. In many cases the desire to control severe damage of this kind has been the reason for a national State extending its jurisdiction beyond the territorial sea." Doc. 29C/22, Paris, 5 August 1997

[92] The preamble endorses the principle of preservation *in situ*, and states that; " [c]ommitted to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of underwater cultural heritage that may be found beyond the territories of States." CLT-96/CONF.202/5 Rev.2 Paris, July 1999 p.1

[93] The preamble includes the following paragraph; "[c]onsidering that exploration, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and equipment as well as a high degree of professional specialisation, all of which indicates a need for uniform governing criteria" CLT-96/CONF.202/5 Rev.2 Paris, July 1999 p.1

[94] The preamble includes the following paragraph; "[b]earing in mind the need for more stringent measures to prevent any clandestine excavation or unsupervised excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance." CLT-96/CONF.202/5 Rev.2 Paris, July 1999 p.1

[95] Hungary wished to emphasis the threats to UCH arising from commercial activities by including a new paragraph in the preamble which reads; "[d]eeply concerned because of activities aimed at the sale, acquisition or barter of underwater cultural heritage, activities that increasingly jeopardize underwater cultural heritage" CLT-2000/CONF.201/3add, Paris, June 2000 p.2

which has wider objectives than simply preservation. This raises complex issues regarding the manner in which various values attributable to UCH can be realised, and whether it is possible for economic values and archaeological values to co-exist in some form, or whether, as the preamble and substantive provisions of the convention suggest, these values are antithetical to one another. It is clear that a number of States do regard these values as antithetical as these States wished to include, as an explicit general principle of the convention, the prevention of commercial exploitation of UCH.[96]

The preamble also evinces the principle of co-operation, derived from article 303 of UNCLOS. It is recognised that any international preservation regime will only be effective if there is sufficient co-operation between States. The duty to preserve UCH therefore falls not only on the State most directly connected to the UCH, but with all States, as UCH belongs to the common heritage of humanity[97]. A number of States wanted to formulate the principle of international co-operation as a substantive general principle of the convention[98]. Thus paragraph 2 of article 3 of the negotiating draft reads;

" [t]o that end, State Parties shall take all necessary measures to co-operate, specially in the event of common interest by reason of the localization of the wreck[99] and the flag State or because of the same cultural, archaeological or historical origin".

The importance of co-operation, as an existing principle applicable to UCH, derived from article 303, is of the utmost importance, and forms the basis upon which the UK attempted to circumvent the difficulties arising from the jurisdictional expansion of coastal States. This proposal, and its analysis, is considered in chapter 3.[100]

The principle of co-operation as a mechanism for preserving UCH is not restricted to States. The preamble recognises that;

"co-operation among states, marine archaeologists, museums and other scientific institutions, salvors, divers and their organisations is essential for the protection of underwater cultural heritage."

It is unfortunate that the substantive articles of the draft convention do not give effect to this belief by proposing a regime that does not take the treasure salvage industry's stake in this resource into account and effectively alienating this interest group. In order to give effect to the sentiment of co-operation amongst interest groups evident in the preamble, and to counter the proposal for the application of the principle of non-commercial utilisation of UCH, the US delegation proposed, as a substantive principle

---

[96] The Chinese delegation proposed the following paragraph, " State Parties should take all necessary measures to prevent the commercial exploitation of underwater cultural heritage" CLT-99/WS/8, Paris, April 1999 p.24
Similarly, the delegation from the Netherlands proposed an article which reads; "UCH to which this convention applies shall not be subject to the law of salvage" (1999 Meeting). Hungary proposed that article 12(2) be moved to form a new paragraph in article 3 as a general principle. CLT-2000/CONF.201/3add, Paris, June 2000 p.4

[97] The preamble declares that "underwater cultural heritage should be preserved for the benefit of humankind, and that therefore responsibility for its protection rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law" CLT-96/CONF.202/5 Rev.2 Paris, July 1999 p.1

[98] CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 para.17

[99] Hungary proposed the alteration of the term 'wreck' to UCH. CLT-2000/CONF.201/3add p.4

[100] Article 13 of the secretariat draft reads; "[w]henever a State has expressed a patrimonial interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage"

of the convention, the incorporation of the concept of 'multiple use' of UCH[101]. This concept purports to take into account the interest of a number of groups who utilise UCH, particularly historic wreck, as a resource. This would include archaeologists, historians, salvors, fisherman and the general public.[102]

The important role of education and training as a basic principle underlying the preservation of UCH is enshrined in the convention, which reads;

"[c]onvinced that information and multidisciplinary education about underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activity affecting it, will enable the public to appreciate the importance of the underwater cultural heritage to humanity and the need to preserve it ..."

Preservation through education may prove to be the most important protective measure contained in the convention. The use of draconian legislative measures may not have the desired result, and may result in more damage being done to UCH, particularly if the salvage industry is driven underground. The realisation that education and public awareness is an important key in the preservation of UCH is of the utmost importance.

The development of this draft convention is a result of the development in both UNCLOS and regional initiatives such as the 1985 European draft convention. It is thus an attempt not only to reinforce standing principles, but also to introduce new principles and propose a new structure for an international preservation regime. As such, the preamble recognises not only the need to codify existing rules relating to UCH, but also to progressively develop these rules. It thus evinces an intention to develop areas of international law that may be considered inadequate to sufficiently preserve UCH. Such development, however, must be conducted in conformity with international law and practise, including the regime applicable to UCH in international waters, UNCLOS. The manner in which this progressive development can be achieved is, however, complex, and is considered in greater details in chapter 4.

The preamble clearly sets out the aims and justification of the convention.[103] The actual preservation mechanism will be based on the jurisdictional competence of individual States, requiring each State to undertake to preserve UCH that falls within its competence in a prescribed manner in the interests of all humankind. Thus each State is required, *inter alia*, to establish educational and national services to preserve UCH, to impose sanctions for breaches of prescribed duties, to ensure that the benchmarking standards are adhered to and to prohibit the application of laws which promote an economic incentive to recover UCH.

---

[101] The US has, however, also suggested that this paragraph may be incorporated in the preamble itself, rather than as a substantive provision of the convention. (1999 meeting)

[102] The concept of multiple-use is considered in more detail in chapter 3.

[103] The US delegation proposed a number of new paragraphs in the preamble. Two may be noted. Firstly, a paragraph was proposed that would acknowledge that some underwater sites constitute a gravesite, and should be respected. The US proposal reads; "[u]nderstanding that the site of underwater cultural heritage may be someone's grave and contain human remains that should be respected." This is an important policy when considering the recovery of UCH and should be given specific effect. Secondly, the inclusion of a paragraph requiring that the marine environment in which UCH may be found should also be respected and that damage should be minimised. The US proposal reads, "[k]nowing that the harm or destruction of the natural resources surrounding the underwater cultural heritage should be avoided in managing the underwater cultural heritage." In some case, it may be argued that if the recovery of UCH will result in damage to the marine environment, it is the interests of the latter that should take priority.

Scope of the UNESCO draft Convention

The scope of the convention delineates the application of the provisions of the convention to specific UCH in specific areas. It thus requires determination of what objects, sites of other physical entities might be regarded as UCH for the purposes of this convention, determination of the activities to be regulated and determination of the geographical scope of the convention. Determination of the scope of the convention is complex and has been subject to various forces that have resulted in it undergoing drastic changes at the 1999 meeting of experts. Six discernible areas underwent vigorous discussion and analysis: firstly, the definition of UCH to be used for the purposes of the convention; secondly, the role of abandonment as a criteria for determining the scope of the convention; thirdly, the exclusion of State owned vessels from the scope of the convention, fourthly, a change of emphasis from a convention designed to preserve UCH from any activity which might 'affect' it to those activities which are specifically 'directed at' it; fifthly the geographical scope of the convention and sixthly, the relationship between the draft convention and UNCLOS.

Defining 'underwater cultural heritage'

In order to construct a pragmatic preservation regime, it is necessary to determine which objects, sites or other physical entities might be regarded as UCH and subject to such a regime. The process of selecting material for legal protection is complex, and has been considered in some detail by Carmen. He argues that the process of protecting archaeological material does not begin with attributing a value to the material and then, as a result of this value, granting it legal protection. Instead, he argues that the process begins with a socially induced predilection to seek to protect a certain class of material, and from this a legal regime is structured in such a way that a legal value can be attributed to the material.[104] Thus, while it was indicated in chapter 1 that it is impossible to objectively define the term 'cultural heritage', the term does convey a broad understanding as to what might be contained within its scope. We can therefore formulate a broad understanding of what might constitute the 'cultural heritage'. It has been described in the following ways;

"The cultural heritage consists of manifestations of human life which represent a particular view of life and witness the history and validity of that view."[105]

"The cultural heritage consists of those things and traditions which express the way of life and thought of a particular society, which are evidence of its intellectual and spiritual achievements."[106]

"Cultural property is the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world."[107]

The manifestations of culture may be embodied in entities such as archaeological sites that evidence fossils or early hominid culture[108], prehistoric caves[109], rock paintings[110],

---

[104] Carman, R.J., *Valuing Ancient Things: Archaeology and Law in England* (1993) Unpublished PhD Thesis, University of Cambridge p.34

[105] Prott, L. and O'Keefe, P.J., "Cultural Heritage or Cultural Property" 1 *International Journal of Cultural Property* (1992) p.307

[106] Prott, L., "Problems of Private International Law for the Protection of the Cultural Heritage" V *Recueil Des Cours* (1989) p.224

[107] Preamble to the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works

[108] For example, The Olduvai Gorge in Tanzania, Swartkrans in South Africa, Zhoukoudian in China and Neumark Nord in Germany;191(5) *National Geographic* (1997) pp.84-109

human-built structures[111], ancient cities[112], buildings, gardens and monuments. Other immovable objects, which may be considered as cultural heritage, are natural sites that were considered of specific importance to a particular culture. This may be ritual and ceremonial sites, or natural objects such as trees, rocks, waterfalls etc. which a particular culture may have regarded as culturally important. These are examples of what could be described as immovable objects, though the classification of movable and immovable is particular to the civil law legal system.[113] Movable cultural heritage could include almost any object of some cultural significance, from artistic masterpieces to traces of ancient daily utensils.

It is therefore possible to broadly describe that which might be termed cultural heritage based on the values that may be attributed to it. When the realisation of these values from the physical cultural heritage is threatened, the need arises to structure and adopt a preservation regime to prevent such occurrences. However, in order to structure an adequate regime, it is necessary to determine what aspects of the cultural heritage is to be subject to such a regime. This is no easy task given the subjectivity in defining the term 'cultural heritage'. Yet, a number of international conventions and recommendations have been agreed upon which purport to preserve cultural heritage, and it is therefore instructive to consider these. From the definitions of 'cultural heritage', the values attributed to the cultural heritage are given a legal value, elevating this selected material above other material.

A comparative study in defining 'cultural heritage'

Manifestations of cultural heritage were traditionally dealt with in law as property[114]. The term 'cultural property'[115] was first used in an international legal context in the 1954 Hague Convention on the Protection of Cultural Heritage in the Event of Armed Conflict[116], which defined cultural property to include;

> "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above"

---

[109] For example to caves at Kromdraai in South Africa from which early hominid remains have been found.
[110] For example, the rock art at Lascaux, Altamira and Kakadu; Prott and O'Keefe (1992) *op.cit* p.307
[111] For example, Abu Simbel and Philae (Egypt), Borobudur (Indonesia), and Polonnaruma (Sri Lanka); Isar, Y.R., *The Challenge to Our Cultural Heritage: Why Preserve the Past?* UNESCO (1986) pp.21-29
[112] For example, the cities of Moenjodaro (Pakistan), Sana (Yemen Arab Republic) and Shibam (Peoples Democratic Republic of Yemen); Isar *op.cit* p.23
[113] Prott and O'Keefe (1992) *op.cit* p.308; Prott and O'Keefe (1984) p.153
[114] The 1907 Hague Conventions included provisions for the protection of various cultural heritage, though no single definition was adopted, and the protected cultural heritage was listed in terms of its nature or purpose. It was protected, not in its own right as cultural property, but in the context of protecting civilian property in times of war. The definition of cultural heritage in the Roerich Pact of 1935 was also defined in terms of its purpose, and was limited to the protection of immovable property. See further Toman, J., *The Protection of Cultural Property in the Event of Armed Conflict* (1996) Dartmouth/UNESCO Publishing p.46
[115] Blass states that; "[c]ultural property is a generic term referring to all types of artistic, archaeological, and ethnological material". Blass, M., "Legal Restrictions on American Access to Foreign Cultural Property" 46 *Fordham Law Review* (1978) p.1177 fn.2
[116] 294 U.N.T.S 215. Hereafter "1954 Hague Convention"

Thus, the definition introduced a significance requirement, that the 'cultural property' be of 'great importance' not just to the particular nation in whose territory the property is located, but to all humankind. This necessarily restricts the definition considerably. Each State Party, however, is left to determine this requirement and nominate the property to be protected. It is also noteworthy that the property is to be 'important' rather than be of 'value' which might suggest a commercial value rather than of cultural value.[117] Included in the property to be protected are the buildings which house movable cultural property, such as libraries, museums and archives.[118] Whilst article 1(a) provides protection of objects on an individual basis, article 1(c) provides protection to groups of buildings, such as historic city centres. To this extent, the object to be protected is a large area that may encompass a number of important individual cultural heritage, both movable and immovable.[119]

The 1954 Hague Convention was the first truly international convention to attempt to protect the cultural heritage and so this definition of 'cultural property' was the first attempt to reach some international consensus on what should be protected. Because this convention aimed at protection of 'cultural property' which could be damaged in times of war, the definition was naturally restricted to include only those objects which could conceivably be at risk during these times. This was further limited to only those objects that are important; ensuring that a multiplicity of protected sites would not undermine the protection regime and incur the 'military necessity' exception on numerous occasions.

The term 'cultural property' appears in the 1968 UNESCO Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works[120]. It is defined in fairly narrow terms as the aim of the recommendation is to protect cultural heritage, particularly immovable cultural heritage that may be affected by building operations. The designation 'property' is particularly evident in those treaties and recommendations whose aim it is to stem the flow of illicit cultural heritage. The 1970 UNESCO Convention attempts to list a number of categories of cultural heritage which may be of importance to a State and which could be illicitly excavated and transferred to another State[121]. This definition has been criticised for being overly broad and vague. It is important to note that each State has the mandate to determine which objects it considers to be of importance and liable for inclusion in the definition, subject to the extensive list of categories.[122] Similarly, the 1995 UNIDROIT Convention, though referring to objects rather than property, defines these as;

"those which, on religious or secular grounds, are of importance for archaeology, prehistory, literature, art or science and belong to one of the categories listed in the Annex to the Convention."

The Annex contains a list almost identical to that of the 1970 UNESCO Convention, and, with the element of importance included as a criterion for inclusion in the

---

[117] Toman *op.cit* p.50

[118] Article 1(b) includes "buildings whose main and effective purpose is to preserve or exhibit the movable cultural heritage defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a)"

[119] For a more detailed discussion of the definition of 'cultural property' in the 1954 Hague Convention, see Appendices I and VII and Toman *op.cit* pp.45-56

[120] See Appendix I. It would appear that this definition is broad enough to include immovable and movable UCH situated within a State Party's inland or territorial water. See further Strati *op.cit* p.74

[121] See Appendix I

[122] The definition has been criticised by many nations, including the UK and US. See Williams *op.cit* p.187

definition, suffers from the same interpretation problems as the latter. The 1985 European Convention on Offences Relating to Cultural Property[123] is mainly concerned with introducing criminal and administrative measures to prevent offences against cultural property, punish offenders and to introduce co-operative measures for restitution of cultural property.

Each convention has adopted a definition to suit its particular aim.[124] The definitions of 'cultural property' in the conventions that have attempted to stem the trade in illicit cultural heritage have been extensive, attempting to specifically mention every conceivable object that could possibly be the object of illicit trade.[125] As cultural heritage susceptible to illicit trade is inevitably movables with commercial value, these have featured prominently in the definition as 'property'. On the other hand, the 1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property adopts a broad and rather vague definition of 'cultural property' as the aim is to ensure that as many objects as possible can be exchanged without hindrances.

As is evident from above, the term 'cultural property' includes a wide range of material objects. The classification of these material objects in law as 'property' has, however, been criticised. Property, in the common law system, is a fundamental concept around which important politico-philosophical concept have been developed. Property can be subdivided, in the common law system, as real or personal. Further divisions could include movable and immovable[126], tangible and intangible, public or private, or intellectual property. These divisions may not occur in other legal systems, and the extent to which an object of cultural importance falls within any particular category may be uncertain. The fundamental policy behind property law has been to protect the wide-ranging rights of the owner. In particular, the common law concept has a particular commercial perspective that entitles the owner of property to exclusive rights to alienate, to exploit, to exclude others and even to destroy it. The extensive rights that may be given to the owner may be such that other interests in the property are entirely ignored.[127] However, in all legal systems, the rights of the individual have been restricted in favour of broader public interests. In terms of cultural property, the right of the owner could be restricted if the value of the cultural property to the public is perceived as being of greater importance. The owners' rights could therefore be restricted by import or export controls, prohibition against destruction, zoning of cities to protect important sites and registration in registers. The term 'property' will therefore be associated with different rights in different jurisdictions, and the terminology could cause confusion as to the exact nature of the cultural object[128]. As the term 'property' emphasises the commercial value of the cultural object, it may appear to be the primary value in the object whilst relegating the cultural value of the object to secondary importance. This approach is obviously not conducive to protection.[129]

---

[123] E.T.S No.119

[124] Prott and O'Keefe (1984) *op.cit* p.8

[125] For example, the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property contains a lengthy definitive list of 'cultural property'.

[126] For a brief discussion on the problems related to the distinction between the civil law concepts of movables and immovables, see Reichelt, G., "International Protection of Cultural Property" 1 *Uniform Law Review* (1985) p.67

[127] For example, in some American states there are no controls on archaeological excavations on privately owned land as they are perceived as imposing on private property right; and O'Keefe *op.cit* (1992) pp.309-310

[128] Prott and O'Keefe (1984) *op.cit* pp.197-202

[129] Prott and O'Keefe (1992) *op.cit* p.311

It has been argued that the manifestations of a culture are not only evident in material objects, but may also be in the form of intangibles. These intangibles could take the form of patterns of behaviour, rituals, ceremonies, oral history, folklore, music, dance and knowledge of skills. It may also include the knowledge and information that may be attached to a material cultural object, such as how and when it was used, how it was made, for whom it was made etc. Although some of these intangibles may be recognised in terms of intellectual property law, most will not be regarded as property, and in law may not be the object of any rights. The notion of the 'cultural heritage' has therefore been advanced as being more appropriate than the notion 'cultural property' as it will not only take into account the intangible manifestations of cultural, but also remove the political and legal connotations that attach to the term 'property'. The use of the term 'heritage' is important in that it introduces a temporal dimension to the concept; the idea that it is to be preserved for the next generation.

The first time that the notion of 'heritage' was associated with cultural objects, was, surprisingly, also in the 1954 Hague Convention. Article 1 stated that the cultural property to be protected would include "movable or immovable property of great importance to the cultural heritage". It was not therefore used as a collective term delimiting the property to be protected. The term heritage was first used in this sense in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, which refers to the 'archaeological heritage'. It is unfortunate that later international agreements were not able to follow the terminology of this agreement, one of the earliest international agreements to protect the cultural heritage, in using the term 'heritage' rather than 'property'. Although this definition is restricted to 'archaeological heritage', within that context it is very broad, in that it includes any object recovered from an archaeological excavation, including an underwater excavation, which is considered by that State to be of importance.

The phrase 'cultural heritage' was first used as a collective term delimiting the objects to be protected in an international convention in the World Heritage Convention[130]. This definition is, however, limited in that the convention is to apply only to immovables, such as monuments and sites. With the introduction of the term 'cultural heritage', the definition of the objects to be protected have become broader and more conceptual in nature than those of 'cultural property'. This is evident in the 1969 Council of Europe Convention on the Protection of the Archaeological Heritage[131], which defines those objects which shall be considered as the 'archaeological heritage' in the following terms,

"For the Purposes of this Convention, all remains and objects, or any other traces of human existence, which bear witness to epochs and civilisations for which excavation or discoveries are the main source or one of the main sources of scientific information, shall be considered as archaeological objects."

This definition is framed in very broad terms, with no attempt to actually define the objects themselves, but rather concerns the relationship between the object and its scientific usefulness. The revised 1992 European Convention on the Protection of the Archaeological Heritage, restricts the broad 1969 definition to a certain extent by giving a number of examples of what these archaeological objects could include. The definition includes reference to examples of objects, such as "structures, groups of buildings, developed sites and movable objects" while also including a broad

[130] 1037 U.N.T.S. 151
[131] E.T.S No.66

significance criteria, such as "the preservation of which help to retrace the history of mankind and its relation with the natural environment".[132]

The use of the terms 'cultural property' and 'cultural heritage' are yet to be adequately defined, and the inherent distinctions between the two terms have yet to be grasped. The 1985 European Convention on Offences Relating to Cultural Property[133] contained a definition of 'cultural property' but referred to the 'cultural heritage' in the preamble, suggesting that 'cultural property' is a subdivision of 'cultural heritage'.[134]

In conclusion, it is evident from existing international conventions that there is no definitive definition of 'cultural heritage' or its content. Each convention has formulated a relatively unique definition to fit its purpose. However, three main structures are evident. On the one extreme, is a very general definition, which may be given more specific content by the State Parties. This, however, tends to create problems of interpretation. On the other extreme, there may be an exhaustive list of cultural heritage, effectively narrowing the protection to only those included[135]. This, however, leads to problems of 'gaps' appearing. A medium is a definition that, though couched in general terms, include a list of examples as a guide.

It is clear that a new UNESCO convention on the protection of UCH is designed to address one particular issue in relation to the protection of cultural heritage in general and cannot hope to provide a definitive definition of cultural heritage, much less UCH. Thus, the definition does not, and cannot determine what is UCH, but only what UCH will be subject to the protective regime.

The development of a definition of 'underwater cultural heritage'

UCH is merely an environmentally confined category of cultural heritage. Initial preservation regimes therefore simply included it within the definition of terrestrial cultural heritage. For example, the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations included UCH within its scope and is therefore the first to provide some recognition of the need to preserve UCH. This formulae has been followed in a number of subsequent instruments, such as the 1985 European Convention on Offences Relating to Cultural Property[136]. This convention contains an extensive definition of what objects make up the 'cultural heritage' and specifically states that the convention will apply whether these objects are found on land or underwater. UCH was therefore dealt with as a necessary extension of jurisdiction to preserve terrestrial cultural heritage. A similar regime was applied in 1992 when, partly as a result of a failure of the Council of Europe to adopt the 1985 European draft convention, the European Convention on the Protection of the Archaeological Heritage was revised to extend the definition of the archaeological heritage to include those found underwater.

The recognition of UCH as having preservation needs that transcend those of terrestrial cultural heritage is an important step towards the development of an international preservation regime. The preservation needs of UCH in various

---

[132] See Appendix I
[133] E.T.S No.119
[134] The preamble includes the statement that "believing that such unity is founded to a considerable extent in the existence of a European cultural heritage." Similarly, the 1954 Hague Convention aims to protect "movable or immovable property of great importance to the *cultural heritage*" (Own emphasis)
[135] Reichelt *op.cit* p.69
[136] E.T.S No.119

maritime zones were considered during UNCLOS III and consideration was given to a definition of the UCH that was to be preserved.

The interpretation of the term ' objects of an archaeological and historical nature'

Both articles 149 and 303 of UNCLOS refer to "objects of an archaeological[137] and historical[138] nature", but these terms are not defined in the Convention. As such, the terms are vague and "unfortunately emphasise objects instead of archaeological sites and their contexts".[139] Nor is it certain whether the terms should be read conjunctively, as it is in the Chinese, English and French texts, or disjunctively, as in the Spanish, Arabic and Russian texts[140]. As the English terms refer to disciplines that, though related, are quite distinct in nature, it is submitted that the terms should be read disjunctively. Strati argues that the term 'archaeological and historical' should be defined to include both movables and immovables[141] older than 100 years[142]. The justification for the age limit is based on a number of arguments. Firstly, a number of national cultural heritage laws, both general and specific to UCH, use the 100 year age limit or a fixed time varying from 1600[143] to 1937[144]. The use of the 100 year time limit is also apparent in a number of international conventions and recommendations, including the 1970 UNESCO Convention[145] and the 1985 European Convention on Offences Relating to Cultural Property[146]. Secondly, that as an early draft of article 149 included reference to a term of 50 years, the presumption is that the drafters intended

---

[137] Archaeology is defined as the "scientific study of our past human culture through material remains." Delgado, J.P. (ed.), *Encyclopaedia of Underwater and Marine Archaeology* (1997) British Museum Press p. 33.

[138] The term 'historical' was included in the definition at the insistence of the Tunisian Delegation who feared that the term archaeological would not necessarily cover objects from the Byzantine Empire. See further Oxman, B. H., "The Third United Nations Conference on the Law of the Sea: The Ninth Session" 75 *American Journal of International Law* (1980) p.241 and Strati *op.cit* pp.180–181. History, it is said, is written by the victors. It is therefore extremely difficult to define historical or determine what is historical. Though a number of national legislation refer to historical as a criteria for determining protection, none define the term. See for example, UK (Protection of Wrecks Act 1973), Norway (Cultural Heritage Act 1979, Act of 9 June No. 50), Ireland (National Monuments (Amendment) Act No. 17 of 1987), France (Act Concerning Marine Cultural Property 89-874 of 1 December 1989) and the Netherlands (The Monument and Historic Buildings Act 1988). Historical may refer to the uniqueness of the vessel, it's origin, it's state of repair as opposed to similar vessels, it's unique connections to important historical events etc. For example, it is uncertain whether the *R.M.S Titanic* falls within the definition of 'objects of historical and archaeological nature'. Newton argues that the uniqueness of the vessel's design and lavish decor will satisfy this criteria, while Allen argues that by virtue of the magnitude of the disaster, the *R.M.S Titanic* should be considered historic. Newton *op.cit* p.178; Allen, B.L., *Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the Law of the Sea Convention* Special Publication of the Institute of Marine Law, University of Cape Town No. 14 1991, p.12. However, it may be argued that the vessel cannot provide us with any evidence of our history which we do not already know, and therefore is not of archaeological importance. Arend argues that the "Titanic does not qualify as an archaeological object" and therefore not susceptible to protection under articles 149 or 303. Arend *op.cit* p.779. See also Strati *op.cit* p.199 fn.81 concerning the definition in the other official languages.

[139] Elia, R.J., "US Protection of underwater cultural heritage beyond the territorial sea: problems and prospects" 29 (1) *International Journal of Nautical Archaeology* (2000) p.44

[140] Nordquist *op.cit* p.160

[141] For a discussion of Strati's arguments concerning this aspect of the definition, see Strati *op.cit* p.182

[142] See also Barrowman *op.cit* pp.231-246; Cycon D.E., "Legal and Regulatory Issues in Marine Archaeology" 28(1) *Oceanus* (1985) p.83 and ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) pp.8-9

[143] In the case of Hong Kong, Antiquities and Monuments Ordinance 1971, See Strati *op.cit* p.202

[144] In the case of Gambia, The Monument and Relics Act No.8 of 1974; See Strati *op.cit* p.202

[145] 10 I.L.M. 289; Article 1(k).

[146] E.T.S No.119

the articles to apply to objects of a relatively recent origin.[147] Thirdly, Strati argues that archaeology in not necessarily related to objects of prehistory and that there is nothing in the *travaux preparations* to indicate that such a restrictive interpretation was intended[148]. However, Oxman states that "the provisions were not intended to apply to modern objects whatever their historical interest"[149] and that article 149 "at least suggests the idea of objects that are many hundred of years old". He suggests that the articles should only apply to objects older than the fall of the Byzantine Empire (1453), though he does concede that this could be adjusted to take into account important historical landmarks of the Americas, such as the fall of Tenochtitlan (1521) or Cizo(1533)[150]. Similarly, Arend argues that the "objects must at least be old enough that the laws of salvage do not apply to them".[151] This he states means that "there is no person, legal or natural who might be able to claim title to the objects in question."[152] Lastly, Strati argues that the recent trend in attempts to preserve UCH and the recognition of this in UNCLOS should allow for a broad definition so as to cover all objects more than 100 years old. While there is clearly no unanimous agreement on this issue, it does appear as if the trend in both national and international preservation measures tends to be inclusive in scope, covering objects that have been submerged for more than 100 years as objects of an archaeological and historical nature. It is unfortunate that this terminology continues to be used when referring to UCH in the context of UNCLOS. For example, 'objects of an archaeological or historical nature' are referred to in regulation 8 of the ISBA Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area.

The UNESCO definition of 'underwater cultural heritage'

The definition section of the negotiating draft of the UNESCO convention contains the following article;

Article 1: Definitions[153]

1. (a) 'Underwater cultural heritage' means all traces of human existence [which have been] partially[154], totally or periodically[155] [situated] underwater for at least 100 years, [or are 100 years old and underwater], including:
(i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and

[147] Strati *op.cit* p.180
[148] See also Migliorino (1982) *op.cit* p.1
[149] Oxman (1980) *op.cit* p.241 fn.152
[150] Oxman (1988) *op.cit* p.365
[151] Arend *op.cit* p.779
[152] *Ibid* p.779 fn.8.
[153] CLT.96/CONF.202/5 Rev 2 July 1999, Paris. This definition is based substantially on the earlier UNESCO definition, which stated that; "For the purposes of this Convention: 1(a) 'Underwater cultural heritage' means all underwater traces of human existence underwater for at least 100 years, including: (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and (b) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with it's archaeological and natural context. (b) Notwithstanding the provisions of paragraph 1(a), a State Party may decide that certain traces of human existence constitutes underwater cultural heritage even though they have been underwater for less than 100 years".
[154] 'Partially' will refer to objects part of which remain submerged. For example, the wreck of the USS Arizona in Pearl Harbour, Hawaii. Though not having been submerged for over 100 years, it does illustrate the way in which a vessel may be partially submerged.
[155] 'Periodically underwater' will refer to those objects that lie in the inter-tidal zone, and are only submerged during high tides. For example, the wreck of the VOC vessel *Amsterdam* at Hastings, UK.

(ii) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.
(b) Notwithstanding the provisions of paragraph 1(a), a State Party may designate certain traces of human existence within its jurisdiction as underwater cultural heritage even though they have been underwater for less than 100 years.

This definition does differ from some UNESCO conventions in that it is designed with a practical objective as opposed to an abstract contemplation[156]. The definition is derived from the ILA definition, which itself was based on the 1985 European draft convention[157]. Essentially, the definition provides for blanket inclusion of all traces of human existence which have been underwater for over 100 years[158]. This definition, unlike many of the conventions dealing with terrestrial cultural heritage, is broadly defined and primarily concerned with the environment in which the cultural heritage is found rather than what constitutes UCH. This has aroused considerable controversy during negotiations as a number of States have opposed a blanket inclusion and favoured the limitation of the definition to UCH deemed archaeologically and historically significant.

'All traces of human existence' would include all objects that provide evidence of humanity's past. The listed objects serve only as examples that are most likely to be found underwater and fall within the definition of UCH[159]. This does, however, have the effect of raising a rebuttable presumption that these listed objects are UCH.
The 1985 European draft convention contained a definition of UCH that excluded reference to the 100 year period, with the result that the definition was overly inclusive and ambiguous and was so widely defined that it would include both significant and insignificant objects. It appeared that any object which was evidence of human existence and which was found underwater would be regarded as UCH. This could for example, presumably include a bottle thrown into the sea one day and recovered the next[160]. The scope of the convention was therefore limited to UCH that has been underwater for over 100 years. This age requirement, however, was not a defining criteria, and only determined what UCH would be subject to the provisions of the convention. Thus, in terms of the convention, no matter what age an object, it was defined as UCH. The ILA draft convention proposed an almost identical definition of the UCH. The official comment to the ILA draft stated that the definition and scope of

---

[156] Strati suggest that the definition contained in the 1992 European Convention on the Protection of the Archaeological Heritage (Revised) E.T.S No.143 is 'philosophical' in nature. CLT-99/WS/8, Paris, April 1999 p.15
[157] The 1985 Europe draft convention includes the following definition; "all remains and objects and any traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or recovered from such environment, or washed ashore, shall be considered to be part of the underwater cultural heritage, and are herein referred to as 'underwater cultural property."
[158] A number of states have used time periods as a criteria for protection, including the Netherlands (50 years – The Monument and Historic Buildings Act 1988); Denmark (100 years – The Protection of Nature Act 1992, Act No. 9 of 3 January 1992); Finland (100 years); Norway (100 years – The Cultural Heritage Act 1979, Act of 9 June No. 50); Sweden (100 years – Act Concerning Ancient Monuments and Finds of 30 June 1988); and Greece (all UCH dating from prior to 1453, and those UCH from 1453 to 1830 on the advise of the Archaeological Council. The latter will therefore include a significance criteria).
[159] There has been some debate concerning these exemplary items. For example, some delegations proposed the deletion of the term wreck in article 1(1)(b). (Argentina and Peru, 2000 meeting). This suggestion is welcome given the differing interpretations of the term wreck and its unique legal meaning in common law. For the meaning of the term wreck in common law see Dromgoole, S., "A note on the meaning of 'wreck'" 28(4) *International Journal of Nautical Archaeology* (1999) pp.319-322. There was also some debate as to the utility of including the word sites, though it would appear that the majority of delegates at the 2000 meeting favoured its inclusion. (Canada, Poland and Malta, 2000 meeting)
[160] Bederman, D.J., "The UNESCO Draft Convention on Underwater Cultural heritage: A Critique and Counter-Proposal" 30(2) *Journal of Maritime Law and Commerce* (1999) p.332

the convention was "designed to make it easier for administrators and courts to decide if something is covered by the Convention or not" and was "an efficient means of separating out material which is more likely to be important from that which is less likely."[161]. By combining the original ILA definition of UCH with the 100 year limit of the ILA draft's application, the UNESCO convention has gone some way in limiting the scope of the definition of UCH[162]. Despite this, the UNESCO definition has been criticised as still being vague in that it does not introduce any qualitative measure of an object's significance[163], and merely assumes that the object's age is most likely to define its archaeological, cultural or historical significance[164]. The 100 year time period is somewhat arbitrary and based more on administrative pragmatism than on archaeological, cultural or historical significance[165], though it has be presumed that objects older than 100 years may be archaeologically or historically significant.[166] A number of States, however, have argued that not all objects older than 100 years are archaeologically or historically significant. It has been suggested that a significance criterion should be introduced, such as replacing "all traces of human existence" with "objects of prehistoric, archaeological, historical or cultural significance."[167] However,

---

[161] O'Keefe and Nafziger *op.cit* p.406.

[162] In other words, the UNESCO definition is a combination of articles 1(1) and 2(1) of the ILA draft.

[163] *Besides the use of the term 'significance' other international conventions* have used qualitative terms such as 'importance', 'value' or 'interest', all of which may be interpreted in a number of ways. Prott and O'Keefe illustrate the difference between the scientific meaning and legal meaning of a qualitative term such as 'of interest' in Prott and O'Keefe (1984) *op.cit* pp.168-172. See also Blake *op.cit* p.34

[164] The UK Joint Nautical Archaeological Policy Committee proposed the following guidelines for determining the historical significance of a wreck and the degree of protection afforded. (a) All wrecks sites (ship structure, groups of associated artefacts or both) earlier in date than 1650AD would be afforded total protection; (b) Other wreck sites up to 1850 that retain a substantial and coherent element of ship's structure and vessels of special historical importance, or sites where there are groups of artefacts which are a major contribution to knowledge of the period should be protected; (c) Certain vessels of later date which demonstrate a significant advance in ship technology or have special historical significance. The Salvage Association have advocated that only wreck prior to 1860 should be protected, as protection of later vessels would interfere with legitimate commercial interests in the wrecks. The salvage association have kept records of all insured losses since 1860. *Heritage at Sea: Proposals for the better protection of archaeological sites underwater*, Compiled by the Joint nautical Archaeological Policy Committee (May 1989) Published by the national maritime Museum. See also Cleere, H., "Government Response to 'Heritage at Sea'" 6(5) *British Archaeological News* (1991) p.15

[165] Comments by ICOMOS representative (2000 meeting)

[166] A number of States have supported the time period of 100 years, including Argentina, Australia, the Dominican Republic, Cuba, France and Syria (1998, 1999 & 2000 meeting). Some States were in favour *of a time period of 50 years, though many would agree on* 100 years *in* order to reach consensus. These included Argentina, Croatia and Hungary (2000 meeting). A 50 year period had, however, been rejected by the ILA as it was noted that such a time period would include relatively recent wrecks that would have identifiable owners and therefore cause considerable administrative difficulties. ILA Sixty-Fifth Conference, *Report of the International Committee on Cultural Heritage Law*, Cairo, Egypt (1992) p.365. Poland suggested that all artefacts that have been submerged prior to 1945 and are still submerged should be defined as underwater cultural heritage. (1998 meeting)

[167] CLT-99/CONF.202/5 Rev, Paris, April 1999. The US delegation suggested the following definition; "Underwater cultural heritage means objects of prehistoric, archaeological, historical or cultural significance found underwater on or under the seabed, and which has been underwater for at least 50 years, including; (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and (*ii*) wrecks such as their vessels, aircraft, other vehicles or any part thereof, their cargoes or other contents, together with their archaeological and natural context." (For a similarly worded proposal by the US, see WG1 WP1, Paris, 4 July 2000.). The US position was supported by France, Japan, India, Russia and the UK (1999 meeting and 2000 meeting). In particular, the Japanese delegation criticised the term "all traces of human existence" as being too broad and argued that the definition as a whole would "cause a wide-ranging interpretation". This delegation also criticised the use of the 100 year temporal limit as it was argued that in many cases it was difficult to determine whether an artefact had been underwater for 100 years without extensive scientific research. (Japanese comments distributed at the 1999 Meeting). The Ivory Coast questioned the link between the time period

the presumption would then be that State Parties would have to prove that an object falls within this definition before being able to apply the provisions of the convention. Before an object's significance can be determined, it may be necessary to provide protection for these objects and a presumption of significance should therefore work in favour of preservation until such time as it is determined not to be of significance. In order to accommodate the argument that not all cultural heritage that has been submerged for more than 100 year is significant, there may need to be a mechanism for allowing States to disapply the provisions of the convention to such insignificant objects[168]. Thus, a significance requirement may still be necessary, though it would be incumbent upon an interested party to prove that the particular object is not significant and therefore should not be preserved under the convention.

An alternative method of introducing a significance requirement would be to create a hierarchy of presumptions of significance, so that cultural heritage over a specific age is presumed to be of significance, while more recent cultural heritage will require proof of significance before being included in the convention.[169]. This, however, would still require a determination of age, which may not always be possible, though it could be presumed that if the age is indeterminable, the object is presumed to fall within the protected age bracket[170]. The introduction of a significance requirement will naturally entail the drafting of a set of criteria to determine the significance of an object. Criteria such as rarity[171], age[172], association with important historical events or people[173] or

---

and the significance of UCH, stressing that it was the significance that was essentially the important value. The Egyptian delegation proposed the inclusion of the phrase "which are of outstanding universal value from the point of view of history, art or science" in the definition. (CLT-2000/CONF.201/3, Paris, April 2000). The US position reflects US National legislation under which only significant objects will be preserved. (Abandoned Shipwreck Act 1987 and Guidelines). Similarly, the UK national legislation (The Protection of Wrecks Act 1973) requires that the objects may be protected if they contribute or appear likely to contribute significantly to the understanding of the past on account of their historical, archaeological or artistic importance. There is therefore no temporal requirement for preservation. The 'youngest' historical shipwreck protected under the Protection of Wrecks Act 1973 is the HMS *A1*, a Royal Naval Submarine that sank in 1904. Similarly, the first 'historical shipwreck' to be preserved in Australian waters under the Australian Historic Shipwrecks Act No.190 of 1976 was a Japanese Submarine sunk in 1942 by the Royal Australian Navy. See Allen *op.cit* p.11

[168] Denmark, for example, noted that there may be submarine cables and pipelines which may be over 100 years old and still in use, and should therefore not be included in the definition of UCH. There was therefore a proposal that the following be included in article 1; " Installations deliberately placed on the seabed and still in use for their purpose shall not be considered underwater cultural heritage" (WG1 WP2, Paris, 4 July 2000). The Chairman of working Group 1 proposed the following reworded article, "Cables and pipelines deliberately placed on the seabed and still in use for their purpose shall not be considered as 'underwater cultural heritage'" CLT-2000/CONF.201/9, Paris, 7 July 2000

[169] The Irish delegation suggested that UCH could be defined as objects of archaeological or historical significance, with the presumption that objects older than 400 years would be presumed to be significant. (1998 meeting). The Polish delegation suggested that objects to be preserved should satisfy both a temporal limit and a significance requirement. (1999 meeting).

[170] The Colombian delegation noted that there were a number of 16th and 17th century vessels in Colombian territorial waters, and that is was extremely difficult to determine the age of these vessels until a thorough archaeological excavation is undertaken. (1998 Meeting)

[171] This refers to vessels which were either one-off designs or to vessels that represent the only or one of the last remaining examples of their type. For example, in the UK, the *Inoa II* and the *Resurgam* represent one-off design, while the *Hanover* Packet represents the last remaining wreck of a postal packet.

[172] Age may be closely related to the rarity as the older the vessel is, the more likely it is to be the only remaining example. This temporal requirement alone is presumed in the UNESCO draft by the use of the 100 year limit, though it could be used in combination with other significance criteria. The national legislation of the Netherlands declares an object made by man to be a monument if it is more than 50 years old *and* significant because of its beauty, value to science or its folklore. (Monument Act of 1961). Examples of vessels that have sunk within the last 100 years and may be of historic interest include the *R.M.S Titanic* (sunk in 1912) and the *Lusitania* (sunk in 1915). Similarly, the Swedish delegation

association with a particular historic period[174] may be used. More problematic will be the determination of who decides which objects are significant. This will depend on where the object is recovered. In areas under the jurisdiction of the coastal State it may be required by the convention to establish a body to determine such issues[175]. In areas not under the jurisdiction of the coastal State, it may be that either an international committee is established or the State Party of the national or flag State of the recovery vessel will determine its significance. The latter is only viable if the State becomes a signatory to the convention.

A further problem with the 100 years period is that it is not entirely clear from which point this time period is measured. As one of the aims of the convention is to promote *in situ* preservation, it may be presumed that this should be calculated from the time that any activity directed at the UCH is contemplated, and not merely from the time of discovery.[176] Thus, the determination of the time period should work in favour of preservation of UCH. A number of delegations proposed that this time period should refer to the age of the object rather than the time of its submergence. The Greek delegation was particularly concerned that objects at least 100 years old but underwater for less than 100 years should be preserved[177]. This, unfortunately, indicates a serious misconception regarding the aims of the convention, which is to promote *in situ* preservation and the application of archaeological standards when recovery is deemed necessary. An archaeologically or historically important artefact, older than 100 years, which is recently submerged is in danger of being damaged by the elements and should be recovered as soon as possible. The application of the provision of the convention, and particularly those of the Annex, would not be appropriate and in all probability result in the artefact remaining submerged and in marine peril for longer than necessary. The application of traditional salvage law would best suit the recovery of such objects. Thus, the elimination of salvage law from the convention would prevent recently submerged artefacts from being speedily recovered. A number of States have therefore

---

referred to the wreck of the Estonia as requiring protection as a grave and memorial. (1999 Meeting. See Agreement Regarding the MS/Estonia, 6 November 1995, printed in 20(4) *Marine Policy* (1996) pp.355-356). An further example of national legislation that employs both a significance criteria and a time limit to define UCH, but with the possibility of including more recent vessels within the definition, is that of the People's Republic of China. In the Protection and Administration of Underwater Cultural Relics Regulations 1989, 'underwater cultural heritage' is defined as "the cultural heritage of mankind with historical, artistic or scientific value..." The regulation then goes on to state that "the above provisions do not include underwater remains dating later than 1911 which are unrelated to a significant historical event, revolutionary movement or renowned person." See Zhao, H., "Recent Developments in the Legal Protection of Historic Shipwrecks in China" 23 *Ocean Development and International Law* (1992) pp.305-333

[173] Such as the preservation of the *Victory* in memory of Lord Nelson

[174] This refers to a vessel which is the best preserved example of a particular vessel from a particular period, even though a number of lesser examples still exist. The lesser examples may therefore not necessarily be of significance. See Criteria for the Identification of Important Historic Vessel Remains, and for the Designation of Restricted Areas under the terms of the Protection of Wrecks Act 1973 produced by UK Department of Culture, Media and Sport.

[175] In the UK, the Minister of Culture, Media and Sport's designation of a vessel under the Protection of Wrecks Act 1973 is dependent on the advice obtained from the Advisory Committee on Historic Wreck.

[176] For example, if a vessel sunk in 1890, is discovered in 1980, surveyed in 1985 and recovery operations undertaken in 1995, its determination as UCH is calculated from the time that recovery is contemplated (i.e.1995) and not from the time of its discovery (i.e. 1980). If the latter period was used, this wreck would not constitute UCH and would therefore not fall with the scope of the convention.

[177] While some delegations supported the Greek proposal, such as Spain, Syria and the Dominican Republic, a number of delegations, though sympathetic to the Greek concerns, did not. This included Denmark, US, Australia, Malta, ICOMOS, and the Netherlands. Chile, while sympathetic to the Greek concern, noted that such a provision might contradict any reservation made by a State to the 1989 London Salvage Convention, article 30(1)(d).

proposed the deletion of the term that includes in the definition artefacts that "are 100 years old and underwater". This, it is submitted, is a sensible proposal.

The provisions of the convention are intended to apply to UCH that can still be found underwater, either partially or totally, or that has been recovered. As such, proposals such as that of France, which states that UCH "means any cultural property situated partially or totally underwater for at least 100 years" would be unacceptable as it may be construed as applying only to UCH underwater and not to UCH which has been retrieved[178]. A preferable solution would therefore to be to adopt the Australian proposal which defines UCH as all traces of human existence [and spiritual associations] which have been partially or totally underwater, periodically or continuously, for at least 100 years[179]. This may be construed as applying to UCH that is underwater and continues to be so, and UCH which was underwater but has now been recovered.

Although a number of commentators have suggested that this definition is too broad[180], it has also been criticised for being too narrow in that it only applies to traces of human existence and does not provide any scope for inclusion of cultural landscapes or palaeontology[181].

Article 1(b)[182] states that;

"Notwithstanding the provisions of paragraph 1(a), a State Party may designate certain traces of human existence within its jurisdiction as underwater cultural heritage even though they have been underwater for less than 100 years".[183]

This will allow a State Party to decide that an object that has been underwater for less than 100 years[184] is of historical interest and should be classified as UCH. This would

---

[178] (CLT-2000/CONF.201/3, Paris, April 2000 p.4). A similarly unsatisfactory proposal was made by India, which read, "'Underwater Cultural Heritage' means all traces of human existence which are 100 years old and underwater ..."

[179] Australian proposal, based on a Canadian proposal. (CLT-2000/CONF.201/3 p. 4).

[180] Sweden, (1998 meeting), Turkey and Uruguay (1999 Meeting)

[181] CLT-98/CONF.202/7, Paris, 29 June-2 July 1998 p.4. The Belgium delegation (1998 Meeting of Experts) suggested that the definition should include non-human resources, such as paleontological objects. Similarly, France criticised this definition as being 'overly anthropocentric, while Australia proposed the inclusion of natural features of cultural significance to indigenous peoples that have spiritual association with the oceans. CLT-2000/CONF.201/3, Paris, Paris 2000 p.3. An earlier draft of the ILA convention referred to "fossilised and non-fossilised paleontological and other pre-historic specimens", but was later dropped from the definition. CLT-99/WS/8, Paris, April 1999 p.16, footnote 35. The Archaeological Institute of America (AIA) also called for an expanded definition to include non-human archaeological objects, such as Paleo-Indian sites. Anon., "Comments of the Archaeological Institute of America on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage" 7(2) *International Journal of Cultural property* (1998) pp.538-544; Prott, L.V., and Srong, I. (ed.), *Background materials on the Protection of the Underwater Cultural Heritage.* UNESCO/Nautical Archaeology Society (1999) p.174.

[182] Article 1(b) of the ILA draft stated that; "[n]otwithstanding the provisions of paragraph 1(a), a State Party may decide that certain traces of human existence constitutes underwater cultural heritage even though they have been underwater for less than 100 years"

[183] The delegation of the Ivory Coast argued for the deletion of article 1(1)(b) (1999 Meeting). The delegation of Nigeria similarly argued for the application of 100 years without the right to protect more recently submerged objects. The delegation noted that article 1(1)(b) was rather arbitrary in nature.(1999 Meeting). The UK delegation argued strongly in favour of article 1(1)(b), though it did suggest that a time period of 50 years would apply, whilst 1(1)(a) would not have a time period, but would rather include a significance criteria to determine the scope of the definition. The South African delegation also argued in favour of article 1(1)(b). However, vessels in this category, such as the *R.M.S Titanic* or *Estonia*, are normally protected as memorials and grave sites and beyond the scope of this convention, and should therefore be protected under separate bi-lateral or multi-lateral conventions.

enable each State Party to unilaterally alter the definition of UCH and effectively mean that the temporal requirement is, in fact, not an essential element of the definition. This will effectively resurrect the unduly wide scope that existed in the ILA draft. For the sake of definitional certainty, it would have been preferable to have declared that a State could apply the provisions of the convention to a vessel which does not constitute UCH solely because it has not been underwater for the last 100 years.

The effect of utilising article 1(1)(b) is that a State could merely declare a recently sunken vessel to be UCH and the provisions of the convention would apply, including the prevention of commercial salvage. There is no requirement for a State to show cause as to why the particular object should be preserved[185]. However, should a significance requirement be introduced to the definition in article 1(1)(a), it would have the effect of limiting State discretion under 1(1)(b). If, however, the blanket preservation definition is to be retained, article 1(1)(b) may require the inclusion of a significance requirement.

The original ILA definition did not specify that this power related only to vessels in the State Party's territory[186]. Following objections from a number of States, the application of article 1(1)(b) was limited to areas within the coastal State's jurisdiction[187]. As the coastal State may have limited jurisdiction in areas beyond the territorial sea in terms of UNCLOS, the Japanese delegation argued that the term 'jurisdiction' should be replaced with the term 'sovereignty', so as to limit the coastal State's power to utilise article 1(b) to UCH situated in its territorial sea only. However, it is submitted that 'jurisdiction' in the context of the draft convention should be interpreted as State's jurisdiction over UCH, and so the maritime zones that may fall within the term will be dependent on deliberations concerning article 5. It may, therefore include the CZ, CS and EEZ.[188]

In areas beyond the coastal State jurisdiction, objects that have been submerged for less than 100 years cannot be protected under the convention as no State would have the power to utilise article 1(1)(b). It is therefore unfortunate that an object's preservation will not depend on its significance, but rather on its location, and result in an unfortunate duality of regimes. In order to overcome this, it may be preferable for an international organisation, such as UNESCO, to make such determinations for objects beyond coastal State jurisdiction. State Parties could propose vessels for preservation; much as States propose sites for protection in terms of the World Heritage Convention.

---

[184] A similar provision is found in Norwegian national legislation, which allows the administration to designate an ancient monument or antiquity as protected even though it does not satisfy the age requirement. Cultural Heritage Act 1979, Act of 9 June No. 50.

[185] The Japanese delegation raised the possibility of a State protected vessels in terms of article 1(1)(b) even though they were of no archaeological or historical importance.

[186] The failure of the ILA draft to specify any territorial jurisdiction resulted in an inability to determine which State had the power to use article 1(1)(b) to preserve such vessels. It was therefore unclear whether this pertained to the flag State of the recovery vessel, the flag State of the sunken vessel or the coastal State. (Sweden and Turkey, 1999 Meeting)

[187] The Chinese delegation proposed the inclusion of the term "according to its law" after the word heritage in article 1(1)(b). This would be an important introduction as it would limit the expanded definition of 'underwater cultural heritage' to Chinese national law, rather than amount to an exercise of definitional expansion by a State Party at international level. A Chinese determination under article 1(1)(b) will therefore not have any president value under the convention.

[188] A number of States have made proposals to include reference to the exact maritime zones in which article 1(1)(b) will apply. See, for example, the Canadian and Egyptian proposals in CLT-2000/CONF.201/3, Paris, April 2000

The determination of significance

Not all traces of human existence found underwater are of archaeological importance, including some traces that are over 100 years old. Archaeological value is a relative concept, and some traces may be more valuable than others. The management of UCH requires that resources be allocated differentially depending on the relative archaeological significance of the various individual UCH. The question that has arisen at UNESCO is whether this determination of significance should be a factor that delimits the scope of the convention, or whether it is simply an aspect of the management of this resource. While some States have argued that the scope of the convention should be restricted to UCH that is deemed significant[189], the majority of States prefer a system of blanket preservation. However, the justification for both these approaches appears to be the same in that the proponents argue that the particular approach is the most effective way to manage UCH.[190] There is thus a conflict over the nature of the management of UCH.

The strongest proponents of the view that the scope of the convention should be limited to UCH which is archaeologically significant, include the US and UK. The US have stated that the term 'all traces of human existence' is "too broad both legally and as a management tool, and a 'significance' criteria should be added...". This position is proposed on the basis that few States could possibly have the management capacity and resources to preserve all UCH that might fall within this definition.[191] This particular view is coloured by that State's national management structure and legislation for the preservation of UCH. Thus, questions of significance must be considered within a system that allows for private recovery of UCH that is not deemed significant[192]. State funding is allocated only to UCH deemed significant, while private funding may be directed towards the recovery of all other traces of human existence. However, funding would be required for the determination of whether any particular UCH is significant. In a State such as the UK, in which the National Inventory of Maritime Archaeology lists approximately 30 000 sites dating between 1200 to 1945[193], it would be extremely costly to investigate each wreck. As such, significance is narrowly construed, so that at present only 48[194] wrecks are currently regarded as of sufficient significance to be protected. Thus, the significance of UCH is a reflection of the capacity or political willingness of the State to provide funding for the management of the UCH. This is certainly not conducive to a regime that will preserve UCH for the benefit of humankind, as the determining factors are limited to a particular State.

It is submitted that the use of a regime of blanket preservation is probably the more cost effect management regime for UCH. In giving effect to the principle of *in situ* preservation endorsed in the draft convention, blanket preservation allows a State to

---

[189] This includes Japan, Sweden, Egypt, UK and US. The UK delegation proposed that article 2, on the scope of the convention, be amended to incorporate a significance requirement, and read "This Convention shall apply to underwater cultural heritage which is of scientific, historical or archaeological significance to one or more State Party to the Convention which have declared an interest in the underwater cultural heritage concerned. State parties shall co-operate in the event that there is any doubt as to the determination of significance." (1999meeting).

[190] These include Poland, Argentina, South Africa, Italy, Portugal, Hungary, Australia, Spain and Mexico (2000 meeting)

[191] *Comments of the United States of America on Selected Articles being considered in working group one* distributed at the 200 meeting, 4 July 2000

[192] The same applies for the UK.

[193] Keith, D.H., "Going, Going – Gone!" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO p.274

[194] http://www.st-and.ac.uk/institutes/sims/Adu/adu.htm

fulfil its duty to preserve UCH in its territory by ensuring that the UCH is not disturbed. There is therefore no cost associated with determining whether the UCH is of significance, as this is presumed. While the allocation of funding will be dependent on a significance requirement, this will be undertaken on the basis that all UCH already receives the benefit of *in situ* preservation. To propose that only significant UCH should be preserved *in situ* entails the costly and time consuming task of determining significance before preservation can be authorised[195]. In a system that presumes that UCH is not significant, and therefore allows recovery by private individuals until such time as the UCH is deemed significant, the risk arises that the significance requirement could be determined too late for an *in situ* preservation regime to be applied. At the same time, a risk arises of infringing rights granted to the individual before this finding of significance.[196]

Abandonment

The scope of the UNESCO draft has been substantially enlarged by the elimination of the requirement of abandonment[197]. The original UNESCO draft had stated that " *This Convention applies to underwater cultural heritage which has been abandoned...* "[198] The ILA originally felt that the introduction of a presumption of abandonment was needed in order to avoid the complex issues associated with ownership of sunken vessels. UNESCO, however, noted that no other international or regional convention aimed at the preservation of cultural heritage addresses the issue of ownership of the cultural heritage[199]. These issues are left to be determined according to the domestic legislation of each State[200]. As none of these conventions apply to cultural heritage in areas beyond State jurisdiction, it was possible to rely solely on national legislation. However, in areas beyond the territorial jurisdiction of coastal States, no State's exclusive domestic law will apply. The determination of which domestic law will be applicable in each case may therefore be problematic. This will involve a determination of the applicable domestic law according to the rules of the conflict of laws of the forum.

Relevant international law conventions do not provide a clear indication of ownership issues in relation to UCH. Article 149 of UNCLOS, which applies to the Area, does not address the ownership issue at all, though it does recognise that some States may have

---

[195] The Polish delegation commented that "all remains of human activity situated underwater for specific period of time should be covered by automatic legal protection until it is determined that they do not have any archaeological, historical, artistic or scientific value." Comments submitted to the third meeting, 3 July 2000

[196] See Fletcher-Tomenius, P and Williams, M., "The draft UNESCO/DOALOS Convention on the Protection of underwater cultural heritage and conflicts with the European Convention on Human Rights" 28(2) *International Journal of Nautical Archaeology* (1999) pp.145-153

[197] The original UNESCO draft convention held that; "[u]nderwater cultural heritage shall be deemed to have been abandoned: (a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of such underwater cultural heritage within 25 years after discovery of the technology; or (b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in the underwater cultural heritage."

[198] This article was substantially based on the ILA draft convention, which stated that "[t]his Convention applies to underwater cultural heritage which has been lost or abandoned and is submerged underwater for at least 100 years. Any State Party may, however, protect underwater cultural heritage which has been submerged underwater for less than 100 years"

[199] CLT-99/WS/8, Paris, April 1999 p.17

[200] It was noted that some States' legal systems to do recognise the concept of abandonment by non-use (France) or at all (India) (1999 Meeting).The delegation of Uruguay noted that abandonment is a Roman Law concept which is not the basis for all legal systems (1998 Meeting).

an interest in the UCH. Article 303(3), which may apply to the EEZ and CS, does address ownership rights to objects in these maritime areas and specifically requires that the convention does not prejudice the rights of owners[201]. There are, however, no indications as to what rights owners might have and how to determine whether these rights have been lost by abandonment.

The majority of delegations at the 1999 Meeting of Experts therefore felt that the convention should apply to all UCH regardless of ownership and, as such, the requirement for abandonment was erased from the draft.[202]

The exclusion of state owned vessels

Article 2(2) of the UNESCO draft convention states that;

"[t]his Convention shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of its sinking, only for government non-commercial purposes" [203].

As the scope of the original UNESCO draft was limited by the criteria of abandonment, the question arose as to whether the criteria for abandonment of 'State owned vessels'[204] differed in any respect to that of merchant vessels. As such, the question concerning the inclusion of State owned vessels was directly related to the question of abandonment. The inclusion of an article excluding State owned vessels from the provisions of the convention reflects the modern view that States do not abandon their property without an express declaration to that effect.[205] While this does raise questions concerning the validity in international law of the application of the express abandonment theory to

---

[201] The 1985 European draft convention also applied the 'without prejudice' formulae of UNCLOS. See CLT-99/WS/8, Paris, April 1999 p.17

[202] The following nations concurred with the deletion of the requirement of abandonment; Argentina, Dominican Republic, South Africa, Jamaica, Ivory Coast, Greece, Malawi, Ireland, India, Benin, Cuba, Iraq, Tunisia, Syria, Australia, Uruguay and US. However, the delegations of Finland and Korea argued for the retention of the requirement of abandonment, although the delegation of Finland did note that the link between abandonment and technology in the definition was problematic. The Spanish delegation proposed the inclusion of an additional paragraph, which states that "the property and remains of a shipwrecked vessel whose national flag is known to be a State Party shall not be deemed abandoned unless the said State explicitly declares its intention to abandon them." Dr Strati quite correctly points out that this indicated confusion between flag State jurisdiction and ownership. The identifiable flag State cannot abandon the vessel unless it is also the owner of that vessel. The distinction between jurisdiction over cultural heritage and ownership of cultural heritage is vitally important. In this regard, O'Keefe notes that, "two major problem areas seem to keep reappearing: state jurisdiction and title to wrecks. Put very simply, state jurisdiction means the ability of the state to control activities. In the international arena, it is basically a question of what states will allow each other to do. On the other hand, title refers to the question of who owns the shipwreck and other material on the sea floor. It is vitally important that these concepts not be confused - they are philosophically and legally different matters. Just because a state has jurisdiction does not mean that it necessarily has title. It is possible to keep control separate from ownership. Ownership is a relative concept; not absolute. Ownership does not have a constant content. It differs among legal systems, over time and according to the object or even concept to which it relates. When considering ownership the particular legal system concerned must be examined. It is indeed possible for control to be exerted by one state but ownership to reside in another state or private person." O'Keefe, P.J., "The Law and Nautical Archaeology: An International Survey", in Langley, S. and Unger, G., *Nautical Archaeology: Progress and Public Responsibility* (1984) BAR Series pp.9–10

[203] CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[204] For convenience, the term' State owned vessels' will refer to "any warship, naval auxiliary, other vessel or aircraft owned or operated by a state for non-commercial purposes".

[205] See for example US practise in *Digest of United States Practise in International law* Vol. 8 pp.999–1006.

State owned vessels[206], it did avoid complex issues of State immunity and flag State jurisdiction as these would not apply to abandoned State owned vessels. However, with the elimination of the criteria of abandonment as a determining factor in delimiting the scope of the convention, these complex issues have arisen.

It is axiomatic that remains of State owned vessels of the past may fall within the broader term 'cultural heritage' and should therefore be recovered in an archaeologically sound manner[207]. As the convention aims to provide preservation irrespective of ownership, a number of States have argued for the inclusion of such vessels in the convention[208]. Two separate issues are discernible. Firstly, which State owned vessels, if any, should fall within the scope of the convention, and secondly, if it is determined that some State owned vessels are to be included in the scope of the convention, the extent to which the flag State can maintain exclusive jurisdiction over the sunken State owned vessel. The second issue is made more complex by the fact that a State owned vessel might be found in international waters or in the territorial waters of a coastal State. The application of State immunity in these circumstances may differ.

State immunity in international law

Under international law, a State has complete and absolute jurisdiction within its territory, which includes the territorial sea. National courts may therefore adjudicate any issue over which it has territorial jurisdiction[209]. However, if the party to a dispute is another sovereign State, the territorial sovereign may waive its exclusive jurisdiction, thereby granting immunity from the jurisdiction of the national court. Sovereign immunity has its origin in the immunity of the person of the foreign sovereign from the jurisdiction of national courts.[210] This non-assertion of territorial jurisdiction is based on the international principles of comity and *pari parem non habet imperium*, the notion that all sovereigns are equal and one sovereign should not therefore be subject to the jurisdiction of another[211]. The immunity of the person of the foreign sovereign later developed into the immunity of the State and its organs. The principle of immunity was absolute and was applied to cover all acts of the foreign State, including the commercial activities of State owned vessels.[212] However, following the emergence of the socialist State, and increasing State intervention and participation in commercial trade, the application of this doctrine of absolute immunity to acts *jure imperii* and *jure gestionis* was brought into question and a number of States applied a restrictive theory of

---

[206] Bederman, D.J., "Rethinking the Legal Status of Sunken Warships" 31 *Ocean Development and International Law* (2000) pp.97-125

[207] For example, the majority of wreck designated as being of historical or archaeological importance in UK territorial waters between 1973 and 1995 are warships. See Firth *op.cit* pp.75-79. See also Dromgoole , S and Gaskell, N., "Draft UNESCO Convention on the Protection of the Underwater Cultural heritage 1998" 14(2) *International Journal of Maritime and Coastal Law* (1999) pp.186-187

[208] This included Brazil, Korea, Finland, Costa Rica, Argentina, Iran, Dominican Republic (Latin American and Caribbean nations), Cuba, Columbia, Canada, Uruguay and Thailand. It should be noted that few of these States have extensive maritime histories, and more likely to have wrecked foreign State owned vessels lying in their territorial waters than they will have their own State owned vessel lying anywhere in the world's oceans.

[209] A national court will not, however, have jurisdiction *ratio materia* that amounts to an Act of State. See Dixon, M., *Textbook on International Law* 3rd Edition (1996) Blackstone Press Ltd p.158

[210] Dugard, J., *International Law: A South African Perspective* (1994) Juta & Co, Ltd p.151.

[211] Higgins, R., *Problems and Process: International law and how we use it* (1994) Clarendon Press p.78

[212] *The Schooner Exchange v McFaddon* (1812) 7 Cranch 116. In this case, the plaintiffs claimed ownership of a French Naval vessel that entered a US port. The US Supreme Court dismissed the case on the basis of French 'State immunity'. See Dixon *op.cit* p. 158. See also The *Prins Frederick* (1820) 2 Dod. 451, in which immunity was claimed in the case of the salvage of a Dutch naval vessel.

immunity[213]. It was not, however, clear on what basis a distinction could be made between acts *jure imperii* and *jure gestionis*, particularly as political ideologies ascribe different functions to the government[214]. The more modern approach is based not on the status of the State, but rather on the nature of the activity undertaken by the State[215]. A further possible solution to this dilemma is to consider whether the act is one that could be performed by a private individual rather than only by a State.[216] So, for example, the act of salvage would be regarded as an act *jure gestionis* as private individuals and a State may undertake the activity. A number of States have adopted legislation in which an attempt is made to distinguish the types of transactions which could be regarded as acts *jure gestionis* from those that are *jure imperii*. For example, the US Foreign Sovereign Immunities Act[217] asserts that "under international law, States are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgements rendered against them in connection with their commercial activities." Naturally, the definition of the term 'commercial activities' depends on the political ideology of the legislating State. In the UK, for example, a commercial transaction is defined in the State Immunity Act 1978 as to include "any contract for the supply of goods or services or any loan."[218] In the US, however, this definition would not be accepted. For example, in *Aerostrade v Republic of Haiti*[219], the US court held that the purchase of military equipment and services received in connection with the purchase of this equipment for use in its armed forces were acts *jure imperii*, and therefore subject to State immunity.

There are therefore a number of difficulties in determining the scope of State immunity in those States, predominately Western European and Common Law States, which have adopted the restrictive theory. Although Latin American States and many new Commonwealth States continue to advocate the application of the absolute theory[220], the former Soviet Union and Eastern European States have began to move towards a restrictive approach.[221] This movement is also evident in the attempt to draft an international convention that is based on a restrictive theory of State immunity. The International Law Commission[222] drafted a set of articles in 1991 on 'Jurisdictional Immunities of States and their Property' which is currently under consideration in the Sixth (Legal) Committee of the UN. [223] A number of aspects of State immunity are under consideration, including the application of measures of constraint against State property.

---

[213] These included, in particular, Belgium, Italy the US, South Africa, Australia and UK. For a more detailed account of these cases, see Badr, G.M., *State Immunity: An Analytical and Prognostic View* (1984) Martinus Nijhoff Publishers pp. 8-15

[214] Crawford. J "International law and foreign sovereigns: Distinguishing immune transactions" *British Yearbook of International Law* (1983) p.89

[215] At first instance, the nature of the transaction, and not the purpose is considered as determining whether the act is one *jure imperii* or *jure gestionis*. The purpose can, however, be taken into account in certain circumstances. See article 2(2) International Law Commission Draft Articles on Jurisdictional Immunities of States and their Property. For an explanation of this article, see Shaw, M.N., *International law* 4th ed. (1997) Cambridge University Press pp.501-505

[216] Higgins *op.cit* p.83

[217] 1976 26 USC 1330

[218] Section 3(3) State Immunity Act 1978

[219] 376 F Supp 1281 (1974); 63 ILR 41

[220] Higgins *op.cit* p.81

[221] Shaw *op.cit* p.499. Badr predicts the development of a uniform principle of State immunity, stating that despite "persistent differences amongst states in their theoretical approach to immunity their practises are substantially alike and are bound to converge further..." Badr *op.cit* p. 149

[222] Hereafter "ILC".

[223] Doc. GA/L/3122, 28 October 1999 *United Nations Press Release "Legal Committee considers bearing of global commercial trends on question of jurisdictional immunity of States"*

In this regard, the committee has proposed that "no measures of constraint, such as attachment, arrest and execution, could be taken against State property in connection with another State's court proceeding, unless: the first State has expressly consented in writing to such measures; or is allocated or earmarked property to satisfy the claim at issue; or the property in question is in the territory of the other State, being used for non-governmental purposes, and is linked to the claim at issue." These developments are particularly pertinent to the case of State owned vessels that have sunk and may be recovered and taken into the jurisdiction of a State other than the flag State for the purposes of securing a salvage award or in order to apply that State's cultural heritage laws.

Summarising the sources on international law, Higgins concludes that "international law today does not require the courts of one state to afford absolute immunity from jurisdiction to a foreign State or government."[224] It can also be concluded that international law has development, and continues to develop, a more restrictive approach to State immunity, and that these developments should be reflected in the UNESCO draft convention.

State owned vessel in international law

Articles 95 and 96 of UNCLOS govern the absolute immunity from jurisdiction of State owned vessels[225]. This immunity is extended to the salvage of such vessels[226]. While this application of State immunity is without doubt, it is uncertain whether this continues to apply after the vessel has sunk.

A number of commentators have opined that sunken vessels cease to be ships and are therefore no longer under the exclusive jurisdiction of the flag State[227]. Caflish, for example, argues that a wreck may no longer qualify as a vessel subject to exclusive immunity of its flag State[228]. Similarly, Riphagen states that in the case of sunken ships "it is understandable that such 'objects' cannot simply retain indefinitely the status under international law of a ship."[229] In respect of warships, Migliorini argues that a sunken warship, having lost the characteristics of a warship, is subject to the same rules as any other sunken wreck.[230] If this is the case, then article 95 and 96 will no longer apply, and State owned vessels will be subject to the same jurisdictional regime as other wrecks[231].

---

[224] Higgins *op.cit* p.81

[225] Article 95, headed "Immunity of warships on the high seas" states that; "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State". Article 96, headed "Immunity of ships used only on governmental non-commercial service" states that; "ships owned or operated by a State and used only on governmental non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the Flag State."

[226] They are exempt from the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (1910)(37 Stat. 1658, T.S. No 516, Article 14) and the International Convention on Salvage (1989) LEG/CONF.7/27, May 2, 1989. See further Strati, *op.cit.* pp.220-222

[227] Dromgoole and Gaskell *op.cit* p.233

[228] Caflish *op.cit* p.25

[229] Riphagen, W., "Some reflections on 'functional sovereignty'" *Netherlands Yearbook of International Law* 1975 p. 128

[230] Migliorino, L., "The Recovery of Sunken Warships in International Waters" in Vukas, B. (ed.), *Essays on the New Law of the Sea* (1985) p.251

[231] Malta has declared that "the immunity afforded by the UNCLOS to warships and other government ships operated for non-commercial purposes applies only as long as they remain in operation: if wrecked,

However, in the absence of a finding of abandonment, the State owned vessel will remain public State property even though it may have lost its status of being a ship. As such, it may be subject to State immunity.[232] Being State property, however, is insufficient in itself to attract immunity under the restrictive theory of immunity.[233] The nature of the activity undertaken will determine the imposition of immunity. In the case of sunken State owned vessel, the State is not actively engaged in any activity[234]. It is, however, the recipient of services in the form of salvage, which, as indicated above, could be classified as acts *jure gestionis*. As such, it would appear that no immunity would apply in such circumstances and the State could not prevent the salvage of State owned vessels. A similar result is found by considering the applicable rules of salvage law. Bederman argues that a State cannot refuse the offer of a salvage service unless, acting as any reasonable owner of a vessels would in the circumstances, the State refuses the salvage service by clearly communicating such a refusal to the salvor before salvage services have commenced[235].

This conclusion can, however, be refuted on other grounds. Article 5 of the ILC draft articles grants immunity to a State in respect of itself and its property unless the activities undertaken fall within those areas specified in the draft articles, the most common of which is commercial transactions. Thus, taking this article as a reflection of current international law developments, as the State is this case will not be engaged in any of commercial activities, immunity may be granted.

It should be recalled that State immunity, as a principle of international law is an exception to a State's application of its law in its own territory.[236] The sunken State owned vessel of another State will therefore have to either be within the State's territory or brought into the State's territory for the principle of sovereign immunity to apply. Thus, it does not necessarily apply to sunken State owned vessels in international waters. However, if possession of a State owned vessel in international waters will not, in practical terms, be recognised in any other States jurisdiction due to the application of the principle of State immunity, the flag State will have effective exclusive jurisdiction of the wreck. The effect of this application is that no State other than the flag State will be able to apply its laws to the sunken State owned vessel. This practical effect has resulted in the principle of state immunity being reflected as a principle that grants exclusive flag State jurisdiction to sunken vessels in international waters. As such, it is claimed that "the State can prohibit any physical interference with that property even to the point of allowing its remains to lie on the bottom of the sea"[237]. In practical terms then, the effect will be the same as if articles 95 and 96 applied. Thus, in international waters, exclusive flag State jurisdiction may continue to apply to sunken warships.

---

they do not continue to enjoy this immunity" *Comments of Malta Concerning the Draft Convention on the Protection of the Underwater Cultural Heritage* distributed at the 2000 meeting, 3 July 2000

[232] Eustis III, F.A., "The Glomar Explorer incident: implications for the law of salvage" 16 *Virginia Journal of International Law* (1975) p.180. See also Rubin, A., "Sunken Soviet Submarines and Central Intelligence: Laws of Property and the Agency" 69 *American Journal of International Law* (1975) pp.855-858; Collins , M. G., "Salvage of Sunken Military Vessels" 8 *Journal of Maritime Law and Commerce* (1977) pp.433-454

[233] Under the absolute theory of immunity, State property will be subject to immunity without a consideration of the nature of the activity undertaken with this property.

[234] In the case of modern sunken warships, it may be argued that the continuing activity of the State is the guarding of its security and military intelligence, and thus *acta jure imperii*. See, for example, the salvage of a Russian submarine by the Glomar Explorer discussed in Eustis *op.cit* p.177-185

[235] Bederman *op.cit* p. 114. This conclusion is supported by Dromgoole and Gaskell *op.cit* p.184

[236] Higgins *op.cit* p.78

[237] Eustis *op.cit* p.186

It appears then that there is no clear rule of international law with regard to continued exclusive flag State jurisdiction over sunken State owned vessels in international waters. Where the State owned vessel sunk in the territorial waters of another State, the problems regarding the question of State immunity and jurisdiction between the coastal State and the flag State arises. In the absence of a clear rule of international law on this issue, cases have been dealt with on an individual basis using bi-lateral agreements between the flag State and the coastal State[238]. There is clearly an opportunity for the UNESCO draft Convention is provide some clarity on this point.

Ownership issues

In order for a State to be granted immunity from the jurisdiction of a foreign court or to maintain exclusive flag State jurisdiction in international waters, the State must continue to own the vessel. While a number of States claim that the express theory of abandonment applies to sunken State owned vessels[239], there is clearly no international law rule governing the criteria for abandonment of State owned vessels[240]. As the UNESCO draft convention aims to provide a preservation regime for UCH regardless of ownership, this vexing international law question will not be addressed.

---

[238] These include the wreck of the *H.M.S Birkenhead*, a United Kingdom vessel sunk in South African territorial waters, (see Agreement between the Government of Great Britain and Northern Ireland and the Government of the Republic of South Africa regarding the Salvage of the *H.M.S Birkenhead*, Pretoria, Sept. 27, 1989, U.K.T.S. No. 3 (1990)); the *CSS Alabama*, a US vessel sunk in French territorial waters (see Agreement between the Government of the French Republic and the Government of the United States of America concerning the wreck of the *CSS Alabama*, Paris, Oct. 3, 1989, T.I.A.S. No. 11687), the *H.M.S Spartan*, a UK vessel sunk in Italian territorial waters (see Exchange of Notes Constituting an Agreement between the Government of Great Britain and Northern Ireland and the Government of Italy regarding the salvage of *HMS Spartan*, Rome, Nov. 6, 1952, 158 U.N.T.S. 432 (1952)) and the *Admiral Nakhimov*, a captured Russian vessel sunk in Japanese territorial waters. (See Anon, "War and Neutrality - Right to a captured vessel - SS Admiral Nakhimov" *29 Japanese Annual of International Law* (1986) pp.185-187.)

[239] See US practise in Digest of United States Practises in International Law Vol.8 pp.999-1006; Eustis *op.cit* pp.181-184; Roach, J.A., "Sunken warships and military aircraft" 20(4) *Marine Policy* (1996) pp.*351-354*. At the *1999* meeting, Spain proposed the following article; "[t]he property and remains of a shipwrecked vessel whose national flag in known to be a State Party shall not be deemed abandoned unless the said State explicitly declares its intention to abandon them" (1999 Meeting). This paragraph does not, however, distinguish between State owned vessels and privately owned vessels flying the state flag of registry. Only the former could be expressly abandoned by the flag State. In a similar vein, the US proposed the inclusion of a paragraph which reads, " [t]itle to State vessels and aircraft shall remain vested in the flag State, unless expressly abandoned or captured in accordance with international law, and shall not be lost through the passage of time." Comments of US distributed at the 2000 meeting, 4 July 2000

[240] Disputes concerning the ownership of sunken State owned vessels include; the *Juno* and *La Galga*, Spanish vessels sunk in US territorial waters, (see *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels* 47 F.Supp. 2d 678 (E.D. Va. 1999); the *La Balle*, a French vessel sunk in US territorial waters, the *Akerendam*, a VOC vessels sunk in Norway; a World War II German U-boat sunk in 1944 (*Simon v Taylor and Another* (Singapore High Ct. 1975) and *U-76* in Norwegian waters. (see Braekmus, S., "Salvage of 'wrecks and Wreckage Legal Issues Arriving from the Discovery of Coins at Runde in 1972" *Scandinavian Studies in Law* (1976) pp.39-68),. In the case of the *Birkenhead* and *CSS Alabama* it is interesting to note that the flag State claims of ownership were not recognised in the Exchange of Notes. In the case of the *CSS Alabama*, France did acknowledge the US's claim in other correspondence. (Roach, J.A., "France Concedes United States has title to *CSS Alabama*" 85 *American Journal of International Law* (1991) p.381). Similarly, the agreement between the Netherlands and Australia regarding VOC vessels does not actually acknowledge the Dutch Government's ownership of these vessels prior to the conclusion of the agreement. (see Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks 1972 reprinted in Prott and Srong *op.cit* pp.75-78). For a detailed discussion on the point of abandonment and ownership of State vessels, see Bederman *op.cit* pp.97-125

State immunity and underwater cultural heritage

The granting of State immunity ensures that sunken State owned vessels cannot be subject to any arrest, attachment or execution pursuant to a legal claim in a foreign State. The precise rules governing the scope of State immunity will therefore be determined by the territorial State, although its legality in international law could be challenged before an international court.[241] It is clear that the policy which guides the application of the principle immunity of State owned vessel is based on mutual respect for each sovereign State's armed forces and governmental activities. There are therefore legitimate reasons for granting exclusive flag State jurisdiction in the case of recently sunken State owned vessels. These considerations do not, however, apply to sunken State owned vessels that fall within the definition of UCH. Irrespective of whether or not a vessel was used for military purposes or was a State owned or operated vessel, it may still be of archaeological or historical importance. It is also highly unlikely these wrecks will be of strategic military or intelligence importance to its original flag State and are unlikely to require immunity for those purposes. As the aim of the convention is to preserve UCH by requiring the application of appropriate archaeological practices to the vessels, there is little reason why such vessels should not be included in the convention.

Application of the principle of State immunity to vessels of antiquity is particularly problematic. A number of delegations at the 1999 meeting of experts noted that it may be difficult to determine whether a particular historic wreck was in fact a 'State owned vessel'[242]. There could be a number of reasons for this. Firstly, a wreck site may be so old that it predates any conception of 'the State' in international law, and no existing State can claim to be the flag State[243]. Secondly, there may be no historic evidence available to determine ownership of the vessel and thirdly, the original flag State may no longer exist as a separate entity, but has been broken up into smaller nation-States or subsumed within a larger State. While article 29 of UNCLOS does provide a definition of a warship for the purposes of that convention, it is inappropriate to apply this recent definition to vessels over 100 years old[244]. It is submitted that if the UNESCO draft convention is to exclude State owned vessels from its scope, then it should be presumed that where these uncertainties occur, the vessel will not be regarded as a State owned vessel for the purposes of the convention.

Throughout negotiations in 1998, 1999 and 2000, three approaches to the question of State owned vessels and immunity were evident. The first approach would exclude

---

[241] Dixon and McCorquodale state that "the principle of State immunity.... Is a principle of international law....should a State fail to apply the principle of immunity in an appropriate case, it will be responsible under international law." Dixon, M and McCorquodale, R., *Cases and Materials on International law* 3rd ed. (2000) Blackstone Press p.315

[242] Denmark raised the point that Viking ships did not fly any flag, and were not necessarily associated with any nation-State. Similar problems arise with regard to privateers. This point was reiterated by the Irish delegation, who pointed out that both Viking ships and Armada wrecks are found off the coast of Ireland, and should be preserved under the convention irrespective of whether they are State owned vessels or not (1998 Meeting).

[243] This would apply in particular to vessel of antiquity, and include such famous sites as the *Uluburun*, *Geledonyia* and *Antikythera* wreck sites.

[244] Article 29 of UNCLOS reads; " [f]or the purposes of this Convention, 'warships' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under the regular armed forces discipline."

State owned vessels from the convention, subject to the flag State's express inclusion[245]. The Canadian delegation proposed the following article: "[t]his convention shall only apply upon an express renunciation in writing of the flag State to warships, naval auxiliary and other vessel or aircraft owned or operated by or on behalf of a State, and used at the time of sinking, only for non-commercial purposes."[246] While this proposal would allow for these vessels to fall within the scope of the convention, it does so at the discretion of the State owner, which may not provide an adequate preservation regime for UCH which are of universal importance.

The second approach proposed to include State owned vessels in the convention with the proviso that the flag State maintained exclusive jurisdiction over the vessel[247]. Implicit in these proposals is the application of the principle of exclusive State jurisdiction over State owned vessels in international waters. This would have the effect of clarifying this principle in international law. Such an approach is most clearly illustrated by the Dutch proposal, which reads; "[i]n applying the rules of this convention, no Party shall interfere with the remains and contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by a State and used at the time of sinking only on governmental non-commercial service, without the explicit consent of that State."[248] This approach has the benefit of requiring both the coastal State or any other State and the flag State to co-operate before any activities directed a the UCH are authorised, thus ensuring that UCH is preserved *in situ* until such time as agreement is reached.

The third approach is to include State owned vessels in the convention and either to exclude the principle of immunity altogether, or to limit it by reference to a time period. The French delegation suggested that a time period could be included before which State owned vessels would be included in the scope of the convention, and which would not be subject to State immunity, although the State's ownership would prevail. Thus, even though these sunken vessels were State owned, they would be regarded as analogous to property subject to acts *jure gestionis* and therefore not susceptible to State immunity. Such an approach would reflect the movement towards a more restrictive approach to State immunity evident in contemporary international law. While the French delegation had suggested that State owned vessel sunk before the seventeenth or eighteenth century could provide a cut-off point, more recent periods of 50 or 100 years underwater or pre-1945 were suggested as possible criteria.[249] Thus, prior to these

---

[245] Japan favours exclusion of State owned vessels (CLT-2000/CONF.201/3, Paris, April 2000)

[246] This is substantially similar to the Spanish proposal made in 1999 which reads; "[t]his convention shall also apply upon express consent in writing of the flag State to the remains and contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by or on behalf of a State". This proposal was received from Spain at the plenary of the 1999 meeting, after discussions on Article 2 were closed. It was therefore decided that it would be ignored by the plenary and not included in the official reports.

[247] France, for example, proposed that State owned vessel be included in the convention provided that only the flag State may authorise activities directed at UCH. This would apply in both international waters and the territorial waters of a coastal State.

[248] CLT-2000/CONF.201/3, Paris, April 2000, p.5. Such an approach is supported by UK, US, Sweden, Malta and Spain. The UK statement most clearly reflects the rationale of this approach. It reads, "The United Kingdom does not wish to exclude military vessels, aircraft or their associated contents from appropriate protection under the proposed convention. At the same time it is essential that the convention respects the sovereign rights of States over their sunken warships and other vessels or aircraft operated for non-commercial purposes. To this end, the convention must make clear that no action may be taken in respect of such vessels without the consent of the flag State. There must also be proper respect for war graves at sea." Comments by the United Kingdom distributed at 2000 meeting, 3 July 2000

[249] CLT-99/WS/8, Paris, April 1999 p. 22

periods, a sunken State owned vessel, although owned by the flag State, would no longer be subject to the exclusive jurisdiction of the flag State. It was recognised however, that the flag State would continue to have an interest in the State owned vessel as owner, and that a duty may be imposed on the flag State of the recovery vessel, or the coastal State, whichever is applicable in the instant case, to co-operate and consult with the owning State of the UCH.[250] This third approach is the most practical of the three, as the use of a time period, particularly 100 years, would be in conformity with the approach taken in defining UCH in article 1 and avoids the problems of determining the flag State for ancient vessels, which would continue to hamper the application of either of the first two proposals.

State owned vessels as memorials

A number of State owned vessels are warships that have sunk in the course of battle, with the loss of service personnel[251]. The concern is that these vessels should either not be disturbed, or if so, should be given appropriate respect. For this reason, the US delegation proposed the inclusion of the following paragraph in the preamble to the convention, "[u]nderstanding that the site of underwater cultural heritage may be someone's grave and contain human remains that should be respected."

Warships that have sunk within the last 100 years will not fall within the scope of UCH, and will therefore not fall within the scope of the convention. Any attempt to protect such a vessel in international waters will have to make use of bi-lateral or a further multi-lateral treaty. However, vessels that have been submerged for more than 100 years may be considered to be a war grave. Whether such a vessel should be designated as a war grave really depends on the reason for this designation. In most cases, no human remains will be found on these vessels so, in effect, no discernible grave exists.[252] The archaeological recovery of these vessels according to the rules in the Annex will therefore not disturb any remains. If, however, remains do exist, they should be removed with due respect in accordance with standards laid down in the Annex.[253] If the purpose of designation is to proclaim a memorial to those who perished, then the original flag State will have to rely on its ownership and concurrent exclusive jurisdiction to designate this site in international waters. If exclusive State jurisdiction is not recognised for State owned vessels in international waters, it may not be possible for a State to unilaterally designate such a site, and it would have to be designated by an

---

[250] The Canadian delegation suggested that where State owned vessels are included in the scope of the convention, a duty to consult the flag State should be imposed. This was supported by Italy, and it may be suggested that such an approach would satisfy the requirement of flag State participation in decisions regarding activities directed as State owned vessels continuously raised by the Spanish delegation, and which appears to refer, in particular, to the wrecks of the *La Galga* and *Juno*. This approach was supported by Finland (2000 meeting). However, this would entail the adoption of an agreement for each wreck on a case by case basis. The failure to conclude a multi-lateral treaty regarding the *R.M.S Titanic* is proof of the difficulties of taking this course.

[251] Sweden, Poland, Israel and Germany were particularly concerned with the question of 'war graves'.

[252] Though there are exception. Human remains have been found to exist on UCH sites, especially wrecks, which were lost over 100 years ago. For example, human remains were discovered on the site of the *Mary Rose*, which sank in 1545. See McKee, A., *How we found the Mary Rose* (1982) Souvenir Press

[253] Reference may be made to the International Council of Museums Code of Ethics (1986) and the Museums Association (UK) Code of Ethics for Museum Professionals (1977, amended 1987) which require ethical and legal consideration to be given to recovery of human remains. Some incidences of divers inappropriate removal of human remains have been recorded. For example, it was reported that divers recovering gold bullion from the wreck of the *H.M.S. Edinburgh* had picked up skulls and used them in conjunction with underwater torches to frighten fellow divers. See Jessop. K., *Goldfinder* (1998) Simon & Schuster Ltd, London. See also "Divers Looting Sunken D-Day War Graves" *The Independent* October 31, 2000.

international organisation such as UNESCO in a manner similar to that proposed by Canada in its proposed additional article governing activities 'affecting' underwater cultural heritage[254].

Determination of the activities to be regulated

An important alteration in the scope of the convention was proposed in 1999 by the Canadian delegation, which would change the emphasis in the draft convention and narrow its scope. The initial UNESCO draft convention used the term 'activities affecting' UCH to delineate the scope of the draft convention and the activities which would be subject to the ICOMOS charter. This included a number of activities identified in the preamble, such as the exploration of natural resources, construction, including construction of artificial islands, installations and structures, laying of cables and pipelines as well as the increasing commercialisation of efforts to recover UCH. The Canadian delegation regarded the use of the term 'affecting' in relation to the wide definition of UCH to be excessively broad[255]. It was noted that, although restricting the ambit of UCH could narrow the scope of the convention, it was more effective to narrow the scope by limiting the nature of the activity involved. The delegation stated that "the main thrust of the proposed convention should be to deal with treasure hunters or dive expeditions which focus on UCH, and not such activities as commercial fishing or cable-laying which only incidentally affect it".[256] It therefore proposed that the term 'directed at' should replace the term 'affecting' in all articles of the draft convention[257]. Only activities that had as their aim interaction with the UCH would be subject to the mandatory provisions of the convention. As such, the term 'activities directed at' underwater cultural heritage is defined in article 1(6) as any "activity, having underwater cultural heritage as its primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage."[258]

Activities such as commercial fishing and cable laying may have an adverse affect on UCH. However, in most cases these effects are caused inadvertently. These industries are reluctant to acknowledge the danger their activities pose to UCH, and States conscious of the importance of these industries in their economies are similarly eager to downplay their potential role. The US, for example, proposed that the fifth paragraph of the preamble be altered so that the threat to UCH from these industries is described as a 'potential threat' rather than a 'growing threat'.[259]

The re-orientation of the convention dealing solely with activities directed at UCH also prompted some States to advocate the removal of any reference to other activities which

---

[254] The Netherlands proposed that a specific article addressing the issue of wargraves should be included (1998 Meeting).

[255] Similarly, the Japanese delegation stated that "the words 'activities affecting underwater cultural heritage' are too broad in scope. They might be interpreted and used as a pretext for interference with other lawful uses of the seas. This phrase should be more limited" (Japanese comments distributed at the 1999 Meeting)

[256] "Comments of Canada" working paper distributed at the Second Meeting of Governmental Experts, UNESCO Headquarters, Paris, 19- 24 April 1999.

[257] This would include articles 4, 5, 6 and 7.

[258] This definition was supported by New Zealand, Finland and Australia. CLT-2000/CONF.201/3, Paris, July 2000, p.4. Malta, however, regarded this definition as to narrow, and proposed that it be widened from activities which had UCH as its primary object to those which had UCH as "its object or as one of its objects". (WG.1/WP.12, Paris, 4 July 2000). This, it is submitted, is a valuable proposal as it would incorporate, for example, marine scientific research operations which have investigations of marine life on UCH as its object, though not the UCH itself.

[259] CLT-99/CONF.204/5, Paris, April 1999

have an incidental affect on UCH.[260] The motivation for such an approach, however, does not necessarily lie in a concern with the incidental industries, but rather with the aim of dealing solely with what is regarded as the major threat to UCH - the activities of treasure hunters.

The Canadian delegation proposed the introduction of a new article, which reads;

> Article X: Activities incidentally affecting underwater cultural heritage[261]
>
> 1. Each State Party shall take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, archaepelagic waters, territorial sea, exclusive economic zone or on its continental shelf[262].
>
> 2. Where a State party designates as requiring special protection underwater cultural heritage in internal waters, archaepelagic waters, territorial sea, exclusive economic zone or on its continental shelf, it shall take all necessary measures to ensure that activities do not adversely affect such underwater cultural heritage[263].
>
> 3. Where UNESCO designates as requiring special protection underwater cultural heritage in the Area, each State Party shall take all necessary measures to ensure that vessel flying its flag do not undertake activities that adversely affect such underwater cultural heritage.

While this article appeared in the negotiating draft, the term 'activities incidentally affecting' UCH was not actually defined, and it was assumed that it consisted of any activity which did not fall within the definition of 'activities directed at' UCH. However, for definitional clarity, Hungary proposed that the term 'activities incidentally affecting UCH be defined as "activity which, despite not having underwater cultural heritage as its object may physically disturb or otherwise damage underwater cultural heritage."[264]

Article X(1) would not require State Parties to apply the strict mandatory provision of the convention to such activities, but rather to undertake the less onerous duty of ensuring that all 'reasonable measures' are undertaken to ensure that activities which will adversely affected UCH are avoided. The extent of the State Parties mandatory duties is therefore narrow in the sense that they are not required to undertake any proactive measures but simply avoidance measures. It is not clear what measures this might include. As the threats to UCH come from a variety of sources such as beam trawling, laying of pipelines and deep seabed mining, it may simply entail ensuring that these activities are not conducted in the vicinity of a known site. Article X(1) only requires States to undertake these measures in a number of maritime zones, excluding the Area. There seems, however, no reasons why States should not take all reasonable measures to ensure that activities in the Area are avoided that adversely affect known UCH.[265] While this minimal level of preservation is provided for all known UCH in the maritime zones specified in article X(1), X(2) provides for a proactive duty on the part

---

[260] Italy proposed the deletion of paragraph five of the preamble that concerns the recognition of the growing threats to UCH from these industries. CLT-99/CONF.204/5, Paris, April 1999

[261] CLT-96/CONF.202/5 Rev.2, Paris, July 1999.

[262] In 2000, the Canadian delegation proposed a newly worded article X(1) which replaced the phrase "activities are avoided that adversely affect known underwater cultural heritage" with "activities that are not directed at underwater cultural heritage nevertheless do not adversely affect know underwater cultural heritage" (2000 meeting)

[263] The extent of the coastal State jurisdiction is this article is dependent on deliberations concerning article 5-7, and is therefore subject to alteration with regard to the CS and EEZ.

[264] WG1/WP.11, Paris, 4 July 2000. See also WP.1/WP.22 Paris, 4 July 2000 for the Maltese proposal to include the phrase "or as one of its objects" after the phrase "its objects" in the Hungarian definition.

[265] See the Hungarian proposal in CLT-2000/CONF.201/3add, Paris, June 2000 p.9

of State when a particular UCH site is regarded as requiring special preservation measures. This proactive duty, to take "all necessary measures to ensure that activities do not adversely affect" such a site will depend on the reasons for designating the site as needing special preservation. As the designation is at the behest of the coastal State, it is difficult to determine what conditions would trigger article X(2).

Article X(3) provides for a designation system by UNESCO, which would be implemented by State Parties. While this implementation is limited to flag vessels, it is submitted that it should include both the State Party's national and flag vessels. While States already have a duty to preserve UCH in the Area in accordance with article 149 of UNCLOS, article X(3) may provide a mechanism for a more stringent preservation regime.

Where a specific UCH object of significance is identified, it may be necessary to ensure that no activity adversely affects it, whether intentionally or inadvertently, and in such circumstances it may be that all activities affecting the object will be prohibited. This, however, will be dependent on designation of this object by the coastal State in waters under its jurisdiction and designation by an international body, such as UNESCO for objects beyond coastal State jurisdiction[266]. Unfortunately, the introduction of a significance requirement in this article, which may not be present in the article defining the UCH, may undermine the cohesion of the convention by creating a dual system of preservation for UCH in international waters. For example, if an object that fell within the definition of UCH was discovered in international waters, the convention would be applicable. Thus, those who would direct any activity at the UCH, such as archaeologists, would have to comply with the provisions of the convention. However, if UNESCO did not designate the site as one in need of special preservation, other seabed users could destroy the site with impunity. It is therefore necessary to determine the conditions upon which UNESCO or a State party might declare a particular UCH site as requiring 'special protection'. Arguably the fact that the site is considered as UCH for the purposes of the convention should be sufficient.

Article X only applies to 'known' UCH. It would therefore appear that States would only be required to take such reasonable measures to preserve sites that have already been discovered. Presumably, an aspect of the measures a State will be required to undertake would be to inform all participants in seabed activities of the existence of this UCH. The greatest danger posed by these seabed activities is to undiscovered UCH sites. It is therefore necessary to require certain seabed developers or users to undertake pre-disturbance surveys in order to determine whether UCH exist in the area which may be threatened. The 'reasonable measures' required to be undertaken by States would not necessarily include such a duty unless it pertained to a known site. A preferable solution would be simply to remove the term 'known' so as to require States to undertake reasonable measures to prevent the disturbance of any UCH site[267]. This would also be

---

[266] The Netherlands stated that in light of article 137 of UNCLOS it doubted whether UNESCO had the authority to make such a declaration, and noted that the system proposed in this article would differ to that in the World Heritage Convention. It also doubted the practicality of UNESCO obtaining information concerning finds on the deep seabed as information arising from activities in this area would be covered by confidentiality rules as deep seabed mining became a commercial activity. CLT-2000/CONF.201/3, Paris, July 2000, p.14

[267] The Netherlands proposed a the following article which would apply to all UCH, and not only known UCH: "With regard to activities that may incidentally affect underwater cultural heritage, each State party, in the exercise of its jurisdiction over such activities in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf shall ensure, to the extent possible, that all reasonable measures are taken to avoid or mitigate possible adverse effects on that heritage and that

advantageous as it makes the distinction between subsection 1 and subsection 2 and 3 clearer in that in regard to unknown sites, *reasonable* measures are required, whilst in regard to known sites requiring special protection, *necessary* measures are required, the latter being a far more stringent set of measures than the former.

The Canadian proposal to differentiate between activities directed at and activities affecting UCH was widely welcomed[268] and has the basis for an eminently sensible and pragmatic approach to the problem. This, however, is dependent on the removal of the requirements that only known sites are subject to such State measures. The introduction of Article X will also have the effect of limiting the scope of the coastal State's jurisdiction in the EEZ and on the CS. This will require changes in these articles to ensure that the coastal State is able to take reasonable measures to prevent certain activities adversely affecting the UCH. This approach is also dependent on the establishment of an international organisation, with responsibility for preserving UCH in international waters.[269]

It is clear that a central issue in the drafting of article X is the relative values of the UCH and those of the activities that might incidentally effect it. By limiting the application of State duties to known UCH, it allows the State to grant its sea users freedom to undertake its activities, subject only to a duty when an UCH site is actually identified[270]. It thus encourages these sea users to refrain from determining whether UCH exists in the vicinity of its activities by undertaking pre-disturbance surveys. Such an approach clearly elevates the interest of sea users above those of UCH. The broadening of the scope of article X by applying it to all UCH and not only to known UCH will eliminate this problem. While sea users may fear that this will unduly restrict their ability to utilise the seabed, it is submitted that this need not be so if the principle of proportionality, as proposed by Belgium, is considered. This proposal imposes upon States the duty to take necessary measures to ensure that all UCH is preserved, defining 'necessary measures' as "those that are deemed essential following an assessment of the probable risk and the degree of seriousness of such possible adverse effects." Construed broadly, it may require sea users to take some sort of pre-disturbance survey, the extent of which will depend on factors such as the probability of finding UCH in a geographical area given historical trading routes or the extent to which the underwater conditions are conducive to physical preservation.

Determination of the geographical scope of the convention

The ILA conceived of this convention as one that would apply to UCH in international waters[271]. In the territorial waters, it was recognised that the coastal State has absolute

---

impact assessments and resulting decisions involve full consideration of such effects." WG.1/WP.37, Paris, 6 July 2000.

[268] The following States welcomed this approach, Malta, Netherlands, Poland and Peru, while the UK agreed in principle (2000 meeting). Korea, however, regarded article X as being drafted too broadly, while Argentina wished article X to apply only to known UCH. (2000 meeting). The US opposed the inclusion of article X on the basis that it incorporated extended coastal State rights not in conformity with UNCLOS. (2000 meeting).

[269] This proposed role of UNESCO will be considered in chapter 6.

[270] The State Party should require the sea user to report the finding of any UCH, in a similar fashion to the duty imposed in regulations 8 and 34 of the ISBA draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, and Annex 4 of the Standard Clauses for Exploration Contract.

[271] The Chairman of the ILA committee noted at the 2000 meeting that the ILA had not intended to include inland waters in the scope of the convention as it would bring into question the relationship between the UNESCO draft convention and the national cultural heritage laws and international cultural heritage laws which might apply to UCH in inland waters. Comment by Dr P.J. O'Keefe at 2000 meeting.

sovereignty and that the convention would not impose any duties on the coastal State with regard to the convention. Deliberations at UNESCO have, however, revealed a tendency amongst a number of States to apply the provisions of the convention to all maritime zones, including both territorial and internal waters[272]. In part, this tendency has arisen due to confusion regarding the meaning of the term 'internal waters', referred to in article 4(1).[273] Within the law of the sea context, 'internal waters' refers to "waters on the landward side of the baseline of the territorial sea"[274] and therefore has an exclusive maritime character.[275] Geographical internal waters, which include rivers, lakes and dams are therefore not 'internal waters' in this context[276]. Nevertheless, a number of delegations did argue that the standards that will be made applicable to the recovery of UCH in the maritime zones covered by the convention should also apply to the UCH in the geographical internal waters.[277] To reflect this, it was proposed to include the following paragraph in article 2, "this Convention applies to underwater cultural heritage found at sea"[278]. The term 'at sea' would include all maritime zones referred to in articles 4-7 and 14 of the draft convention.[279] Alternatively, the negotiating draft included the possibility of including the following paragraph in article 2; "this Convention shall apply to underwater cultural heritage irrespective of its location and to activities which affect or endanger it."[280]

---

[272] 'Internal maritime waters' refers to waters on the landward side of the base line from which the territorial sea is measured. 'Internal maritime waters' therefore exist where this baseline is measured along a line of offshore island or across historic bays so as to include maritime waters on the landward side of the baseline (1999 meeting).

[273] The debate concerning the inclusion of geographical internal waters of the coastal State, and the related question of sovereignty, was inevitably to lead to political statements being made and international policies and positions being propounded. In this case, Syria proposed that article 4(1) should not apply to disputed areas or those areas under foreign occupation. The proposal read; "State Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorise activities affecting underwater cultural heritage in their internal waters and territorial sea, with the exception of underwater cultural heritage in disputed areas or those under foreign occupation." Although this proposal was supported by some delegations, most ardently by Iraq, it would refer in most cases to areas that include geographical *internal waters, and therefore not* necessarily within the scope of the convention. It was, however, agreed that the Syrian proposal would remain in the negotiating text as a footnote. The Italian delegation mentioned that the Protocol to the 1954 Hague Convention would align the concerns of Syria and Iraq. Similarly, article 11 of the 1970 UNESCO Convention regards cultural heritage exported under compulsion from occupied territory as *illicit* (1999 Meeting).

[274] Article 8 of UNCLOS

[275] CLT-99/WS/8, Paris, April 1999 p.29

[276] Some State delegation did argue for the exclusion of 'internal waters' from the scope of the convention, including Italy and Israel. It is however, uncertain whether these objections were to the maritime internal waters or geographical internal waters. The Spanish delegation therefore proposed that a definition of 'internal waters' should be added to article 1 of the draft convention. (1999 Meeting).

[277] The following States proposed the application of the convention to both maritime zones and internal waters; Hungary (WG.1/WP.30, Paris, 6 July 2000; CLT-2000/CONF.201/3add, Paris, June 2000 p.4), Tunisia (WG.1/WP.34, Paris, 6 July 2000), Belgium, France, Australia, Argentina, Canada, Mexico, India and Venezuela (2000 meeting). Similarly, Syria, Austria, Netherlands, Poland and Spain indicated their preference for the application of the convention to the internal waters of the state. The Australian delegation stated that it would prefer the Convention to "incorporate directions as to the processes to be used to ensure the long-term preservation of the materials, both underwater and post-excavation". CLT-96/CONF.202/5 Paris, April 1998. Korea proposed that the convention would apply to maritime zones and only international internal waters, such as international rivers and lakes. (WG1/WP.26, Paris, 5 July 2000, CLT-2000/CONF.201/9, Paris, 7 July 2000). The Norwegian delegation opposed this view on the basis that an entirely separate international regal regime applied in these international internal waters, and that the UNESCO convention should not address these issues and maritime issues.

[278] CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[279] In other words, internal waters, archipelagic waters, territorial sea (article 4), CZ (article 4bis), CS and EEZ (article 5) and the Area (article 14 or 7bis in option 2) CLT-96/CONF.202/5 Rev.2, July 1999

[280] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.3

Given the fact that a State has absolute sovereignty in its territory, any State may, if it so wished, apply the provision of the convention to UCH in its inland waters. It has, however, been proposed that the convention might acknowledge such a power in international law and recognise that a State may choose to bind itself to apply the provisions of the convention to inland waters[281].

Limitation of the scope of the convention by reference to UNCLOS

The relationship between UNESCO and UNCLOS has proved to be the most controversial aspect of the UNESCO drafting process. Those States which view UNCLOS as immutable have proposed that the general principles of the Convention include an article which explicitly states that the convention should be in full conformity with UNCLOS[282]. Alternatively, a number of States have suggested a clause which simple declares that the UNESCO convention does not prejudice the rights and duties enumerated in UNCLOS[283]. In order to appreciate whether UNESCO and UNCLOS are compatible, the extent to which the UNESCO draft may provide for rights and duties of States not contained in UNCLOS needs to be examined. For this reason, the discussion of the compatibility of these conventions will be discussed in chapter 4.

Conclusion

While articles 149 and 303 are difficult to interpret, they do raise the question of the preservation of UCH in international waters, and clearly introduce the principle of State co-operation in this regard. From this principle has developed further initiatives to preserve the UCH, culminating in the present attempt by UNESCO to clarify and formulate a new regime.

The rationale for the new regime is to preserve the archaeological value of UCH. In order to structure such a regime, it is necessary to determine the scope of the convention. From its origins in the ILA draft, the scope has undergone some significant changes, widening considerably through the elimination of the criteria of abandonment and narrowing by limiting the scope primary to activities directed at UCH. While negotiations continue on the question of the inclusion of State owned vessels, signs are encouraging for the widening of the draft in this respect. Although the ILA originally conceived the draft as a mechanism for the preservation of UCH in international waters, concerns for UCH in other maritime zones has prompted attempts to widen the scope of the convention. The dimensions of the definition of UCH continue to be the subject of negotiations, with a two-dimensional debate continuing. On the one axis, the debate concerns the determination of the classes of cultural heritage that might be included, with only shipwrecks at the one end of the spectrum and all UCH, including landscapes and palaeolithic remains at the other end. On the other axis, the debate concerns the criteria of significance, the continuum ranging from the presumption of all UCH over 100 years old on the one end to only universal significance on the other.

It is clear then that the scope of the proposed regime has generally widened since its origins in the ILA draft, and continues to be under pressure from a number of States to

[281] Argentina proposed the following paragraph; "[a]ny State Party, at the time of its ratification or accession to this Convention, may declare that this convention shall apply to lakes and waterways entirely located on its territory" (WG.1/WP.29, Paris, 6 July 2000). Italy and Finland also raised the possibility of including such a clause. (2000 meeting)

[282] This includes the US, UK and Germany (1996, 1998 and 1999 meeting)

[283] Australia, in particular, has favoured the inclusion of such a clause. (1999 meeting)

widen even further. This will have important consequences for the effectiveness and type of preservation regime that might be implemented. The following chapter will introduce the proposed preservation regime, while a critical analysis of the process of widening the scope of the draft and the forces what underpin this process will be considered in chapter 5.

Chapter 3

The Preservation Regime

Introduction

The primary aim of the UNESCO draft convention is to preserve the realisation of the archaeological value of UCH by imposing a set of technical standards of good archaeology on all activities directed at UCH. Whilst the technical standards have, on the whole, received support from most States represented at UNESCO meetings, the manner in which the preservation regime will be structured to achieve this purpose has been controversial. This is particularly so as the primary mechanism in the preservation regime is the elimination of any commercial incentive to recover UCH. Rather than formulating a preservation structure that might take into account that various interest groups attribute differing value to UCH, the convention has avoided any attempts at compromise and endorsed the archaeological purist standpoint. Such an approach prevented any agreement on the basic structure of the preservation regime.

The secondary mechanism utilised in the preservation regime is derived from international cultural heritage law relating to the trafficking in illicitly recovered cultural heritage. While use of the primary mechanism for preservation would ensure that no UCH was recovered for commercial purposes, it was recognised that some UCH may still be recovered in a manner not conforming to appropriate scientific standards. In these cases, it is proposed that States may seize such illicitly excavated UCH imported into its territory and impose sanctions for such importation.

The basic principle of State co-operation in the preservation of UCH, as articulated in article 303(1) of UNCLOS, underpins the preservation regime. Throughout negotiations from 1996 to 2000, the realisation that the structuring of a preservation regime can best be achieved through a more detailed consideration of this principle has developed. As such, deliberations concerning collaboration in activities directed at UCH, sharing of information, co-operation in the provision of technical services, establishment of national services, educational and training facilities have began to take on prominence and a more promising tone.

This chapter shall consider this proposed preservation regime and the suggestions made during the UNESCO meeting of experts to improve it.

Archaeological Standards - Rules of the Annex

The primary aim of the UNESCO draft convention is the preservation of UCH, which can only be achieved if appropriate scientific techniques are made applicable to any interaction with UCH. As a direct response of the decision by UNESCO to proceed with the drafting of a convention on the preservation of UCH, ICOMOS drafted the Charter on the Protection and Management of UCH. It represents the benchmark standard for underwater archaeological excavations and concerns matters such as project design, standards of preliminary investigations, project methodology and techniques, project time-tabling, competence and qualifications of personnel, material conservation, site management, project documentation, curation of project archives and the dissemination

of project results.[1] These standards are technical standards of good archaeological practice and, subject to some changes in wording, were generally considered acceptable to the majority of States at the UNESCO meetings. However, two important aspects of the ICOMOS Charter were the subject of protracted negotiations. The first concerned how the ICOMOS Charter was to relate to the UNESCO convention, and whether it should be incorporated into the convention. If it was to be incorporated into the convention, the extent to which it could be amended to ensure it included the most up-to-date standards and technical specifications was debated. Secondly, the Charter did not concern itself solely with technical standards, and included an article on fundamental principles, one of which was to exclude commercial exploitation of UCH as inherently incompatible with these standards of underwater archaeology. These will be dealt with in turn.

Incorporation and amendment of the Charter

The ICOMOS Charter, having been drafted by a non-governmental organisation, cannot be the subject matter of a binding international agreement, nor annexed to a binding international agreement. In order for the provisions of the Charter to be binding, they must be subjected to negotiation and agreement by State Parties to the UNESCO negotiations[2]. As such, the Charter was regarded, much like the ILA draft, as a blueprint from which negotiations could begin[3]. The resulting Annex, which will form an integral part of the Convention, is substantially similar to the provisions of the Charter. Article 24(1) of the negotiating draft thus incorporates the Annex as follows;

"The Charter annexed to this Convention form an integral part of it, and unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the Rules of the Annex relating thereto."[4]

The very aim of the UNESCO draft is to introduce these archaeological standards, and it is therefore welcome that the Rules in the Annex form an integral part of the Convention[5]. These Rules, however, are technical scientific rules, and therefore susceptible to alteration as technological and academic advances are made. The need to alter these Rules without having to amend the Convention was therefore considered imperative. Thus, article 24(2) was drafted, which reads[6];

---

[1] See Appendix V

[2] States that favoured incorporation of the Charter included Greece, Ireland, Germany and Denmark (1999 meeting). The Canadian delegation thought that the provisions had to be streamlined before they could be incorporated into the convention, while the Japanese delegation considered the terms unacceptable and would only consider the annexation of the Charter as recommendations only. (1999 meeting). After subjecting the Charter to negotiation, a number of States reacted very favourably to the newly drafted 'Rules in the Annex'. These included Poland, Netherlands, Argentina and Portugal. (1999 meeting)

[3] The first draft of the Annex was based on the Canadian proposal, which in turn was based on the ICOMOS Charter.

[4] CLT-96/CONF.202/5 Rev, Paris, April 1999 p.14

[5] Some States did, however, oppose the integration of the Rules of the Annex with the Convention. The US, for example, stated that "the Charter by its terms, contains recommendations and as such, is unsuitable for inclusion in the Convention in this format." CLT-99/CONF.204/5, Paris, April 1999

[6] The ILA draft contained article 15, which stated; "[r]evisions in the Charter by the International Council for Monuments and Sites shall be deemed to be revisions in the annexed Charter, binding on States Party except for those State Parties that notify their non-acceptance to the Director-General of the United Nations Educational, Scientific and Cultural Organisation within six months after the effective date of a revision. UNESCO shall inform the States Party of such revisions prior to the effective date of the revision."

"The Charter may be revised from time to time by the International Council for Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The Director-General of the United Nations Educational, Scientific and Cultural Organisation shall notify all State Parties to this Convention of the text of such revisions. State Parties shall be bound by the revisions, except those State Parties that notify the depository of their non-acceptance in writing. Such notification shall be made within six months after the receipt of the notification of the texts of revisions."[7]

This procedure would allow a non-governmental organisation to alter the contents of a negotiated international convention and States that did not wish to be bound by the alterations would specifically have to register their objection[8]. However, the reason for the inclusion of this process was "to allow the standards to be updated as archaeological and technical developments occur, while avoiding the protracted and complicated procedures involved in amending an international convention."[9] This amendment procedure was clearly unacceptable to a number of States.[10] The US, for example, argued that article 24(2) "is inconsistent with the law of treaties, Article 40 of the Convention of Vienna on the laws of treaties as it is for States to propose and to amend treaties."[11] Article 40 of the Vienna Convention, however, provides the default criteria for the alteration of treaties in cases where the treaty itself does not provide for an alteration mechanism.[12] While the procedure proposed in article 24(2) is clearly unacceptable to a number of States, agreement has yet to be reached on a mechanism of allowing the alteration and updating of the Rules of the Annex without undertaking the cumbersome task of convening a conference of State Parties[13]. Some alternative procedures were proposed, such as that by Venezuela and Israel, which are based on the amendment procedure contained in the IMO convention, MARPOL 73/78.[14] It is essential that a more streamlined mechanism be introduced as the adoption of a Convention with Rules that may quickly become outdated will not bode well for the preservation of UCH.

Commercial incompatibility

Rule 2 of the Annex reads as follows;

"the commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the underwater cultural heritage. This Rule is without prejudice to the provision, to a project conducted in accordance with the Convention, of professional archaeological services or services incidental thereto whose nature and purpose are fully consistent with the Convention and the Annex."[15]

---

[7] CLT-96/CONF.202/5 Rev, Paris, April 1999 p.14

[8] Similar mechanisms are found in other international agreements. For example, the 1944 Chicago Convention on International Civil Aviation 15.U.N.T.S 295, article 12 provides that technical standards relating to air traffic control over the high seas can be altered by the International Civil Aviation Authority to take into account recent technical developments that will be binding on all State Parties without the Authority having to obtain consent from each State.

[9] O'Keefe, P.J., "Protecting the underwater cultural heritage. The International Law Association Draft Convention" 20(4) *Marine Policy* (1996) pp.301-302

[10] The Russian delegation was strongly opposed to any amendment procedure that did not involve direct State participation, and suggested that the member States of the convention meet once every five years to consider amendments (1999 meeting).

[11] CLT-99/CONF.204/5, Paris, April 1999

[12] Article 40(1) of the Vienna Convention states that "*Unless the treaty otherwise provides*, the amendment of multilateral treaties shall be governed by the following paragraphs." (own emphasis)

[13] CLT-2000/CONF.201/10, Paris, 7 July 2000 p.1

[14] See also CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998, paras.46 and 47

[15] CLT-2000/CONF.201/10, Paris, 7 July 2000 Attachment 2, p.5

The evolution of this Rule reflects the difficulty in eliminating entirely the economic value of UCH, and divorcing UCH from an economic context. The original ICOMOS Charter had unequivocally declared that the commercial exploitation of UCH was fundamentally incompatible with the preservation of UCH[16]. From the first round of negotiations, there was, however, opposition to this sentiment, resulting in the negotiating draft proposing a weakened alteration to the mandatory terminology of the ICOMOS Charter. At the conclusion of the second meeting of experts, this rule was reflected as follows;

"the commercial exploitation of underwater cultural heritage for trade or speculation [leading to its irretrievable dispersal] is fundamentally incompatible with the protection and management of the underwater cultural heritage. Underwater cultural heritage shall [should] not be traded, sold, bought and bartered as items of commercial value."[17]

The inclusion of the terms in brackets fundamentally altered the meaning of the text. The inclusion of the first term, 'leading to its irretrievable disposal' will mean that only in this limited instance, would the commercial exploitation be fundamentally incompatible with the rules in the Annex. If a salvor were able to keep the collection of artefacts together, then the commercial exploitation of the collection would be sanctioned. As such, the collection as a whole could be sold or used as the basis for a commercial exhibition. While recognising that UCH may be of archaeological value, and therefore ideally should not be subject to commercial exploitation, there may be instances when such commercial exploitation may be in the public interest. As such, it has been suggested that the mandatory language should be altered to reflect a discretionary exclusion of commercial incentives. Thus, the term 'should' was proposed as an alternative to 'shall' in the last sentence of Rule 2[18]. While these alternatives were meant to distinguish between a mandatory and a discretionary approach, some States argued that, as a Rule in an international Convention, it would be binding and mandatory irrespective of the language used.[19] This, however, would apply to the mandatory duty to implement the Rule, and not necessarily go to the nature of the Rule. Thus, it could be argued that the mandatory duty would be for States to ensure that UCH is not subject to commercial exploitation, unless there are justifiable reasons, according to that State, for allowing such exploitation.

This distinction between a mandatory and discretionary Rule was also reflected in Rule 19, which read;

"[p]roject funding shall [should] not require the sale, acquisition or barter of underwater cultural heritage"[20]

---

[16] The Preamble to the ICOMOS Charter reads, "[u]nderwater cultural heritage is also threatened by activities that are wholly undesirable because they are intended to profit few at the expense of many. Commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage"

[17] CLT.99/CONF.204/CLD.8, Paris, 23 April 1999

[18] The US and UK favour this discretionary approach, while a number of States favoured the use of the mandatory term 'shall', including Australia, Portugal, Malta, France, Spain, Iran, Italy and Canada. (1999 meeting)

[19] CLT-99/CONF.204, Paris, August 1999 para.42. It was also noted that in at least one official language of UNESCO there would be no linguistic distinction between 'shall' and 'should'.

[20] The ICOMOS Charter reads, "[p]roject funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be irretrievably dispersed."

Again, a number of States argued that this duty should be discretionary rather than mandatory, and favoured the use of the term 'should'. It should be noted, however, that this is a limited application of the idea formulated in Rule 2 in that this section refers only to project funding. The sale of artefacts would therefore only be prevented if its primary purpose were to contribute to project funding. If the project has sufficient funding prior to starting, then the sale of recovered artefacts may be allowed. However, if Rule 2 were to be interpreted without the term in brackets, the fundamental principles would qualify the interpretation of this section. Thus, no commercial exploitation would be sanctioned.

Prior to the third meeting of experts, the UNESCO secretariat produced the negotiating draft, which reflected an amended Rule 2, containing two important alterations. The first was to make the irretrievable dispersal of UCH an alternative to trade or speculation of UCH, rather than as a consequence of trade or speculation. Thus, commercial exploitation of UCH for trade or speculation *or* its irretrievable dispersal would be fundamentally incompatible with the preservation and proper management or UCH. This reflected a more anti-commercial bias than was reflected at the second meeting of experts.

The second important alteration concerned the difficulty of divorcing the provision of commercial services during an excavation from the justification of an excavation. Professional archaeologists are paid to undertake scientific investigations, thus making their activity economic in nature. Similarly, the provision of services, such as the supply of diving equipment, remote sensing devices etc, could all be supplied by a commercial enterprise. In order to ensure that these commercial services would be sanctioned, the negotiating draft provided that commercial exploitation of UCH for trade or speculation, other than in the provisions of serves was fundamentally incompatible with the preservation and management of UCH. At the third meeting of experts, it was decided to alter this terminology and to "make specific provisions to ensure that it was clear that (in summary) professional archaeological services consistent with the Convention were not being referred to in this Rule."[21] Thus Rule 2 now reads,

"The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the provision and proper management of the underwater cultural heritage. This Rule is without prejudice to the provision, to a project being conducted in accordance with the Convention, of professional archaeological services or services incidental thereto whose nature and purpose are fully consistent with the Convention and the Annex".[22]

The inclusion of this Rule as a general principle of the set of technical standards of archaeological practise is unfortunate. The Annex purports to contain rules relating to good archaeological practice and should be seen as a standard setting convention. Although favouring *in situ* preservation, it does not necessarily prohibit recovery of UCH and determines the standards of such an operation. It should not, however, necessarily determine the reasons for this recovery. The reasons may be political in nature and inappropriate for a technical standard setting convention. As such, a number of delegations have argued that private recovery operations that are undertaken in accordance with the rules in the Annex should be sanctioned.[23]

---

[21] CLT-2000/CONF.201/10, Paris, 7 July 2000 p.2

[22] CLT-2000/CONF.201/10, Paris, 7 July 2000, Attachment 2, p.5

[23] The US delegation supported this approach and drew attention to the recovery of artefacts from the *R.M.S Titanic* as an example of when a recovery operation with a commercial incentive could be undertaken in accordance with good archaeological practices. (1999 meeting). It should be noted,

Conclusion

The Rules in the Annex are drafted as technical standards of good archaeological practise, and are therefore drafted in such as way as to provide any persons who might interact with UCH with a set of appropriate standards. It has been argued that these Rules are therefore not appropriate for Governments to accept as obligations.[24] However, the obligations which Government are required to fulfil are set out in the Convention, and include the obligation of ensuring that these standards are adhered to. These standards are the very foundation of the process of preserving the archaeological value of UCH and the convention should be drafted in such a way that these standards are given effect[25].

Non-commercialisation of underwater cultural heritage

Article 12(2) of the negotiating draft, under the unlikely heading of 'Disposition of Underwater Cultural Heritage' provides that;

"State Parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage."[26]

As was discussed in chapter 1, the emergence of the scientific discipline of underwater archaeology has resulted in a conflict between the realisation of the archaeological and economic values attributed to UCH. Realisation of the latter has often resulted in the former being lost. The regulation strategy considered in the negotiating draft is simply to disallow realisation of the economic value of UCH.

The justification for the elimination of any commercial incentive to recover UCH can be found in the preamble of the negotiating draft, which includes the following paragraph;

"[a]ware further of increasing commercialisation of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks"

suggesting that commercial activities may be the primary source of the threat by unsupervised activities. This represents a slight shift in the attitude evident in the ILA draft in which the commercialisation of efforts to recover historic wreck is regarded as synonymous with the growing threat to the UCH[27]. It was not the unregulated or irresponsible commercial recovery operations that the ILA considered a threat, but commercialisation *per se*. The negotiating draft preamble, however, recognises that some commercial operations could possibly be conducted in a manner which does respect the fundamental principles of underwater archaeology, and therefore does not

---

however, that many archaeologists do not view the recovery of artefacts from the *R.M.S Titanic* in such light, and are opposed to either the recovery itself or the manner of the recovery, or both.

[24] CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.58

[25] At the first meeting of experts, one expert stated that "the archaeological principles had to be the basis of a normative instrument for the protection of underwater cultural heritage and be binding between States." CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.57

[26] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.10

[27] The ILA draft convention included, in the preamble, the following paragraph; "[p]erceiving that growing threats to the underwater cultural heritage include increasing construction activity, advanced technology that enhances identification of and access-to wreck, exploitation of marine resources, and *commercialisation of efforts to recover underwater cultural heritage*"(own emphasis)

directly state that the commercialisation of historic wreck recovery is a threat, only a factor that raises concern. However, as UNESCO is concerned with "the fact that underwater cultural heritage is threatened by unsupervised activities", this would include the unsupervised activities of commercial salvors, and it is submitted that the inclusion of the paragraph which refers to the commercialisation of UCH is unnecessary, and only serves to draw an unnecessary distinction between commercial and non-commercial archaeological recoveries.

While the preamble to the negotiating draft at first appears less revolutionary than the ILA draft, the substance of article 12(2) is a great deal more revolutionary than anything contained in the ILA draft. Article 4 of the ILA draft had simply provided that salvage law, the mechanism for realising the economic value of UCH, and clearly inappropriate to preserving the archaeological value, would not be applied to UCH[28]. It did not prevent realisation of the economic value by other means. Article 12(2), however, evidences the intention to remove commercial incentives to recover UCH completely[29], even if the recovery is undertaken in accordance with the Rules of the Annex, other than Rules 2 and 19.[30] While it does not specifically refer to salvage law, it does refer to a wider and more generalised group of laws, which will not only include salvage law, but also the law of finds.[31] Thus, the principle of *in situ* preservation, entrenched in the

---

[28] Article 4 of the ILA draft, headed 'Non-Applicability of Salvage Law' states; "underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage."

[29] Article 4 of the ILA draft had explicitly excluded salvage law from the convention. Dromgoole and Gaskell suggest that article 12(2) could be "a somewhat disingenuous attempt to remove a controversial provision, but to reinsert it in a different guise elsewhere." Dromgoole, S and Gaskell, N.; "Draft UNESCO Convention on the Protection of the Underwater Cultural heritage 1998" 14(2) *International Journal of Maritime and Coastal Law* (1999) p.188

[30] Whether a commercial recovery operation could undertake an excavation to the same standards as a professional archaeological excavation would be irrelevant. The mere fact that the excavation is for commercial gain contravenes the Rules in the Annex.

[31] The common law of the US is that which existed prior to 1776 in the American colonies, as modified by local institutions. (Fee, F.H., "Abandoned Property: Title to Treasure Recovered in Florida's Territorial Waters" 21 *University of Florida Law Review* (1969) p.365). The US law of finds is based on "the ancient and honourable principle of 'finders, keepers'." (*Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). It was defined in *Hener v. United* States 525 F.Supp. 350, at 354 (S.D.N.Y. 1981) as follows; " [t]he common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner. The first person to reduce such property to 'possession', either real or constructive, becomes its owner,"(Del Bianco argues that this is a somewhat inadequate definition as it does not clarify when property is abandoned. Del Bianco, H.P., "Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure" 5 *Boston University International Law Journal* (1987) p.16; see also Paull IV, J., "Salvaging sunken shipwrecks: whose treasure is it? A look at the competing interests for Florida's underwater riches" 9(2) *Journal of Land Use and Environmental Law* (1994) p.350 and McLaughlin, S.L., "Roots, Relics and Recovery: What went wrong with the Abandoned Shipwreck Act of 1987" 19 *Columbia-VLA Journal of Law and the Arts* (1995) p. 163). The law of finds has been used in the US as an alternative to salvage law in cases where the wrecks have been abandoned. This is particularly important in the case of historic wreck where the ownership is difficult to determine. McLaughlin contends that courts sitting in admiralty prefer salvage law over the law of finds, as the law of finds encourages the would-be finder to act as quickly as possible in order to obtain exclusive possession of the property. For a discussion of the advantages of applying the law of salvage rather than the law of finds to historic shipwrecks, see Cerise, C.A., "Treasure Salvage: The Admiralty Court "Finds" Old Law" 28 *Loyola Law Review* (1982) pp.1134–1141). Although salvage law is not the appropriate regime in regard to activities directed at UCH, it may be preferable to the law of finds, as salvage law is essentially an evaluation of a service; the better the service the higher the reward. Therefore, the better the archaeological standards of the salvor, the higher will be the salvage award. Finds, however, is concerned with proprietary rights, and not the extent of the service and as such may lead to historical wreck being declared the subject of finds and therefore owned by the finder. The finder will therefore have title to the artefacts, and it may be more difficult to take into account manner in which these artefacts were recovered.

preamble, would be realised, in that recovery would only be sanctioned if necessary for scientific or preservation purposes, and not for the realisation of any commercial benefit. With the proposed limitation in the scope of the convention by applying its mandatory provisions only to activities 'directed at' UCH, a number of countries wished to include, as an explicit general principle of the convention, the prevention of commercial exploitation of UCH.[32] The repetition of this sentiment in the general principles will have an important effect on the draft, clearly entrenching the non-commercial exploitation principle.

As the adoption of article 12(2) would eliminate any commercial incentive to recover UCH, it is natural that the salvage industry would be opposed to this particular aspect of the convention. Arguably one of the most important sentences in the preamble relates to the recognition of other interest groups in historic wrecks, such as divers, diver's organisations and salvors and the necessity of co-operation between these groups for the preservation of UCH[33]. During the drafting of the ILA draft convention, the committee was aware of a number of groups who have an interest in this resource, and concluded in 1991 that provision had to be made for the interests of divers and salvors.[34] It was, however, also said that these interests should not be acceded to altogether[35]. Although the official comments to the draft stated that it was imperative to identify and take account of all relevant interests to create a convention regime that would be effective, it went on to state that it became questionable whether the convention should attempt to incorporate all these and possibly other values, at the risk of diluting the chief effort to conserve the cultural heritage.[36] Article 12(2) is thus a reflection of the decision not to take salvors interest into account, with the consequence that there is little incentive for a salvor to co-operate in preserving UCH and the risk that the treasure salvage industry will simply be driven underground and create a black market for recovered UCH[37]

---

[32] The Chinese delegation proposed the following paragraph, " State Parties should take all necessary measures to prevent the commercial exploitation of underwater cultural heritage" CLT-99/WS/8. Paris, April 1999 p. 24
Similarly, the delegation from the Netherlands proposed an article which reads; "UCH to which this convention applies shall not be subject to the law of salvage" (1999 Meeting)

[33] The preamble reads; "[b]elieving that co-operation among states, marine archaeologists, museums and other scientific institutions, salvors, divers and their organisations is essential for the protection of underwater cultural heritage."

[34] The ILA committee took notice of the multiple-use guidelines applied in the US in the Abandoned Shipwreck Act (Pub. L. No. 100-298, 102 Stat. 432 (1988), section 5) which required the secretary of the Interior to publish guidelines which would (1) maximise the enhancement of cultural resources; (2) foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources of the States and the US; (3) facilitate access and utilisation by recreational interests; and (4) which would recognise the interests of individuals and groups engaged in shipwreck discovery and salvage. Article 10 of the 1985 European draft convention encourages collaboration with diving institutions and qualified archaeologists in order to promote an appreciation of the UCH and an awareness of the need to protect it. Of particular interest is the acknowledgement that "the underwater cultural heritage is threatened by damaging activities by irresponsible amateur divers, but that at the same time the authorities co-operation with responsible amateur divers and their organisations is essential for the protection of the underwater cultural heritage."

[35] O'Keefe, P.J., and Nafziger, J.A.R., "The Draft Convention on the Protection of the Underwater Cultural Heritage" 25 *Ocean Development and International Law* (1994) p.392

[36] *Ibid.* p.394

[37] At least one commentator on this convention has suggested that co-operation with salvors and divers is not realistically achievable. (Letter from Paul Millmore to Foreign and Commonwealth Office of UK). However, as most underwater archaeological sites are found by amateur divers, co-operation is essential. Failure to co-operate with salvors and divers, or consider their interests in this resources, will only result in finds going unreported and illicit excavations. Ultimately, this approach will damage the very interests which the convention purports to serve.

The reluctance to take other interest groups, such as sports divers and salvors, into account is also reflected in the deletion of article 18(2) of the negotiating draft. This article had the requirement that, in the establishment of a national service for the preservation of UCH, the national service should "actively encourage the participation of interested persons in preservation and study of the underwater cultural heritage and in support of archaeological research."[38] While the participation of these interest groups would be "subject to the authorisation and control of the national services concerned and must respect the operative provisions of the Charter", it was still thought that to explicitly encourage the participation of these interest groups in a substantive article of the convention may undermine the draft conventions elimination of commercial incentives to recover UCH.

In order to prevent such an occurrence, and to give effect to the sentiment of co-operation included in the preamble, the concept of 'multiple use' of UCH has been proposed by the US delegation. It purports to take into account the interest of a number of groups who utilise UCH, particularly historic wreck, as a resource. This would include archaeologists, historians, salvors, fisherman and the general public. The inclusion of such a principle would entail the requirement that all user groups be allowed to participate in the preservation regime and that their interests in the UCH resource base would be given effect to within the regime[39]. However, a number of States perceive this principle as sanctioning the commercialisation of this resource[40].

Article 12(2) refers to any internal law or regulation having the effect of providing commercial incentives to recover UCH. Although this will apply to salvage law and other laws specifically enacted in a particular State, international salvage law may still be applicable. Therefore in cases where a national court exercises jurisdiction over UCH in international waters, and applies international salvage law to the recovery, article 12(2) may not be applicable. For example, US Admiralty Courts have exercised *quasi in rem* jurisdiction in a number of cases where artefacts from a historic wreck situated in international waters were brought within the territorial jurisdiction of the court and the court has applied international salvage law.[41] It must therefore be submitted that the phrase 'internal law or regulation' should be broadly interpreted to include any law or regulation that may be applied by that State.

Although article 12(2) can be regarded as the central provision around which many other provisions of the draft are dependant upon, it has received insufficient discussion during any of the UNESCO meeting of experts. A number of States have therefore reserved their position in this regard; in particular, the US, Sweden and UK. The US, however, has tentatively suggested that salvage law and the law of finds may be made non-applicable to UCH in the convention with the proviso that State Parties could enter a reservation against such an article[42]. Alternatively, the US has argued that the duty

---

[38] CLT-96/CONF.202/5 Rev.2, Paris, July 1999, p.12

[39] The US has, however, also suggested that this paragraph may be incorporated in the preamble itself, rather than as a substantive provision of the convention. CLT-99/CONF 202/5 Rev

[40] Including Russia and Australia (1999 meeting).

[41] See for example in the case of the *SS Central America* (*Columbus-America Discovery Group v. Unidentified Wreck of the S.S. Central America*, 742 F.Supp 1327 (E.D.Va. 1990); 974 F.2d 450 (4th Cir. 1992), *Andria Doria* (*J.F. Moyer v. The Wreck of the Andrea Doria*, 836 F.Supp. 1099; 1994 AMC 1021) and *R.M.S Titanic* (*R.M.S Titanic v Christopher Haver and Deep Ocean Expeditions*, 1999, 171 F.3d 943 (U.S.C.A. 4th Cir.)

[42] The proposed US paragraph reads, "[t]he laws of salvage and finds shall not apply to underwater cultural heritage. A State Party, may, however, submit a reservation to this article at the time it deposits its instrument of ratification, acceptance, approval or accession, in accordance with Article 21. A Party

encompassed in article 12(2) should be discretionary in nature rather than mandatory[43]. Some delegations, however, immediately objected to such a reservation clause, arguing that it would substantially undermine the effectiveness of the convention.[44]

Consistency with conventional international law

International law has recognised salvage as the most appropriate law to encourage the rescue of endangered property at sea, particularly in the case of possible environmental disasters. In an effort to make the application of salvage law in States uniform, the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea was adopted in 1910[45]. In 1989, the IMO concluded a convention to replace the 1910 Brussels Convention.[46] The 1989 Salvage Convention makes no mention of any UCH, neither sunken vessels nor their cargo, in the definition of 'vessel' or 'property'. The question of the salvage of UCH was, however raised during negotiations, when France and Spain attempted to have UCH excluded from the convention. These attempts were partially successful in that article 30(1)(d) allows a State to enter a reservation which reserves the right not to apply the convention "when the property involved is maritime cultural property of pre-historic, archaeological or historic interest and is situated on the sea-bed." Taking into consideration the *travaux preparatiores*, the 1989 Salvage Convention is therefore applicable to UCH, unless a State specifically chooses not to apply it.[47]

Eight countries have entered a reservation pursuant to article 30(1)(d). The US, home to the largest and best financed salvage fleet, declined to make such a reservation. Not every country that entered a reservation will refrain from applying the convention to the salvage of UCH. The UK, for example, entered a reservation in accordance with article 30(1)(d) that gave it the right to enter a reservation in the future. As such, the reservation does nothing more than allow the UK to enter a reservation not applying the convention at some future date. Schedule 11 Part 2 paragraph 2 of the Merchant Shipping Act 1995 excludes certain activities from the 1989 Salvage Convention, though this does not include UCH. In the UK, the 1989 Salvage Convention will therefore apply to historic wreck.[48]

---

submitting such a reservation shall, nevertheless, be bound by the other provisions of this Convention, including the rules in the Annex".

[43] The US proposed that the word 'shall' be replaced with the word 'should'. (1999 meeting).

[44] Remarks by the Italian and the Australian delegations. (1999 Meeting).

[45] Brussels, 23 September 1910; TS 4 (1913); Cd 6677

[46] 1989 London Salvage Convention, IMO Doc. LEG/CONF.7/27 (2 May 1989). Hereafter "1989 Salvage Convention". The 1989 Salvage Convention came into force on the 1 July 1996, one year after the 15th instrument of acceptance. (HS vol. 43(1) Para 936 p. 578). It is unclear whether the 1989 Salvage Convention superseded the whole of the common law of salvage, but it is submitted that courts may refer to pre-existing common law in order to interpret the 1989 Salvage Convention. (HS Vol.43(1) Para 928 p. 579). For further discussion on the 1989 Salvage Convention, see Brice. G., "Salvage and the Maritime Environment" 70 *Tulane Law Review* (1995) p.669; Gaskell. N.J., "The International Salvage Convention 1989" 4 *International Journal of Estuarine and Coastal Law* (1989) p.268; Gaskell. N.J., "The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreement" 16 *Tulane Maritime Law Journal* (1990) pp.1-103; Shaw. R., "The 1989 Salvage Convention and English Law" 2 *Lloyd's Maritime and Commercial Law Quarterly* (1996) pp.202-231

[47] Dromgoole, S., and Gaskell, N., "Who has a right to historic wrecks and wreckage?" 2(2) *International journal of Cultural Property* (1993) p.251. See also Dromgoole, S., "A note on the meaning of 'wreck'" 28(4) *International Journal of Nautical Archaeology* (1999) p.321

[48] Brice, G., "Salvage and underwater cultural heritage" 20(4) *Marine Policy* (1996) p.338

Should the UNESCO draft Convention hold that salvage law is not to be applied to UCH, there is a possibility of a conflict occurring in cases where a State has failed to make a reservation under article 30(1)(d). At the 1996 meeting of experts, the expert from the IMO stated that "because of the private-law non-mandatory nature of the Convention, the right to exclude the application of salvage law exists even without express reservation."[49] As Dromgoole and Gaskell point out, if this is so, why would a reservation be required at all?[50] The reason is that while the 1989 Salvage Convention essentially concerns private law, it is an international convention, which imposes on State Parties international obligations. As such, a State Party, which has not entered a reservation in terms of article 30(1)(d) will have to apply salvage law in relation to cases involving a foreign salvor who is a national of a fellow State Party to the Convention, which has not entered a reservation under article 30(1)(d). If, however, both State Parties become signatories to a UNESCO Convention that prevents the application of salvage law to UCH, the provisions of the more recent treaty would prevail, and no conflict would arise. Broad acceptance of the UNESCO convention could therefore avoid this possible conflict. An alternative solution would be for a State Party to the 1989 Salvage Convention to denounce the Convention, and reratify it, at the same time entering a reservation under article 30(1)(d)[51].

Article 12(2) of the negotiating draft also calls into question the compatibility with article 303(3) of UNCLOS. Article 303(3)[52] specifically preserves the law of salvage in the various maritime zones to which it applies. O'Keefe argues that article 303(3) should not be interpreted to prevent later conventions from modifying or excluding the law of salvage in the maritime zones to which article 303(3) applies.[53] This interpretation, he argues, is consistent with that of the 1989 Salvage Convention, which allows States to enter a reservation that will have the affect that the Convention will not apply to UCH. It has also been argued that article 303(3) does not necessarily make salvage law a part of international law, as the French text of UNCLOS, equally authentic to the English, refers to "droit de récupérer des épaves et (...) autres régles du droit maritime", which according to the Italian delegation, "is something different from the common law concepts of the law of salvage and admiralty."[54] As such, there may be no question of a possible conflict between the two conventions. Nevertheless, the UNESCO draft will make fundamental changes to the way in which some States exercise their rights and duties to salvage UCH in various maritime zones.

It has, however, been argued that the UNESCO draft does in fact create the risk of a conflict with article303(3) of UNCLOS.[55] It is clear that as regards two States that may become Parties to a UNESCO convention, the provision of the later treaty will take precedence over the former in relation to a similar subject matter, on the basis that the non-application of salvage law to UCH does not affect the basic principle embodied in

[49] CLT-96/CONF.605/6 Paris, May 1996 p.12
[50] Dromgoole and Gaskell *op.cit* p.189
[51] *Ibid* p.190 footnote.60
[52] Section 303(3) states that "Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practises with respect to cultural exchanges"
[53] O'Keefe (1996) *op.cit* p.303
[54] Document presented by the Government of Italy at the 2000 meeting.
[55] Bederman D.J., "Historic Salvage and the Law of the Sea" transcript of paper Presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, Florida, March 30-31 1998 p.44

UNCLOS and that such an agreement will not affect the enjoyment of other State Parties of their rights or the performance of their obligation under UNCLOS.[56]

Conclusion

While the exclusion of salvage law may give rise to possible conflicts with existing conventional international law, broad acceptance of the UNESCO draft convention would minimise this risk. The chances of this risk occurring should not, however, prevent the progressive development of international law and recourse to the law of treaties provides at least some structure for the resolution of these conflicts.

The preservation regime proposed in the UNESCO draft convention is centred around these attempts to preserve the archaeological value attributed to UCH at the expense of the economic value. This strategy is both politically unacceptable to a number of States, and impractical given the difficulties of policing the oceans and restricting the flow of illicitly excavated UCH[57]. Some States also consider the economic value attributed to UCH could be an incentive for the search for, and recovery of, UCH in a manner that may realise both the economic and archaeological value of UCH[58]. There is therefore a need to consider the structuring of a preservation regime around other concepts in the draft convention, including the use of permits and the imposition of sanction, including seizure of UCH.

Permits, sanctions and seizure

The use of permits, either import permits or excavation permits, are utilised by a number of States to regulate the recovery of both terrestrial and UCH[59], and been agreed upon in conventional international law[60]. Used in association with the provision of sanction for violations of permit provisions, or violation of acceptable standards of archaeological practise, it provides a promising basis for a preservation regime.

---

[56] Article 311 of UNCLOS states that; "[t]wo or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."

[57] Policing underwater sites is extremely difficult, more so in international waters. A number of instances have been reported which relate to theft from UCH sites protected by national laws. See for example, the theft of a cannon from the 15th century historic shipwreck protected under the Protection of Wrecks Act 1973 in the UK. McDonald, K., "Breech of the law" *Diver* (December 1999) p.75. See also "Wreck plunderers find way through law on war graves: Battleship Royal Oak" *The Times* April 4, 1994 and "Divers Looting Sunken D-Day War Graves" *The Independent,* October 31, 2000.

[58] CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.45

[59] See generally Prott, L.V. and O'Keefe, P.J., *Law and the Cultural heritage: Volume 1, Discovery and Excavation* (1984) Professional Book Ltd; Burnham, B., The Protection of Cultural Property: A Handbook of National Legislation (1974) The International Council of Museums; and Anon., *The Protection of Movable Cultural Properties II Compendium of Legislative texts, Vol I and II* (1984) UNESCO Publishing

[60] For example, in the 1970 UNESCO Convention

The enforcement of international cultural heritage law

The enforcement of international cultural heritage laws relies mostly on non-criminal sanctions such as the return, restitution and forfeiture of stolen goods.[61] Most of the conventions and recommendations are designed to create an infrastructure that will prevent offences relating to cultural heritage rather than a system of penal measures[62]. The application of criminal sanctions for offences against cultural property has existed since the proposals included in the Brussels Declaration of 1874[63]. When criminal sanctions are applied, it is normally in the case of cultural heritage trafficking. Thus criminal sanctions will be imposed not only in the case of stolen cultural heritage, but also in the case of the illegal export or import of cultural heritage. For example, the 1970 UNESCO Convention, whilst dealing with the problem of the illicit trafficking in cultural heritage, requires State Parties to impose criminal sanctions only for a specific number of offences. This limitation is a result of the recognition that criminal sanctions may not necessarily be a solution to the problem. Article 2(2) states that State Parties undertake to oppose such practises with the means at their disposal, and particularly by removing their causes..." The solution therefore lies in undermining the reasons for the illicit trade in cultural heritage. Exporting States are required to undertake a number of duties to prevent the illicit export of cultural property whilst importing States are required to co-operate in the recovery and restitution of this property. Criminal sanctions[64], are therefore only to be imposed for the exportation of cultural heritage without a permit from the exporting State[65] or for the importation of cultural heritage stolen from another State's museums or religious institutions.[66] While the imposition of criminal sanctions has been closely linked with the traffic in cultural heritage, rather than with the manner of its retrieval or excavation, a number of conventions and recommendations do impose criminal sanctions for the destruction of cultural heritage or for other offences not related to trafficking. For example, the 1956 UNESCO Recommendation urges the imposition of criminal sanctions for not reporting the discovery of cultural heritage to the competent national services.[67] Other examples include the 1954 Hague Convention and the 1985 European Convention.

The UNESCO draft convention

A basic principle upon which any consideration of a legal regime should be based is proposed by Herscher, who states that " no laws or penalties provide deterrence unless

---

[61] Nafziger, J.A.R., "International Penal Aspects of Protecting Cultural Property" 19(3) *International Lawyer* (1985) pp.835-852; Bassiouni, C., "Reflections on Criminal Jurisdiction in International Protection of Cultural Property" 10 *Syracuse Journal of International Law and Commerce* (1983) pp.281-322

[62] For example, during the 1970 UNESCO Convention negotiations, proposals for the imposition of tougher criminal sanctions on those importing illicit cultural heritage were deleted in favour of a commitment from importing States to co-operate in the recovery and return of cultural heritage. (article 9). See further Nafziger *op.cit* p.838

[63] Toman, J., *The Protection of Cultural Heritage in the Event of Armed Conflict* UNESCO Publishing (1996) p.9

[64] Article 8 1970 UNESCO Convention

[65] Article 6(b) 1970 UNESCO Convention

[66] Article 7(b) 1970 UNESCO Convention. This would therefore apply, for example, to those found in a State in possession of Caravagio's 'Nativity' stolen from an alter in the Oratorio of San Lorenzo in Palermo in 1969.

[67] Article5(c) 1956 UNESCO Recommendation

there is a strong possibility that one who violates them will be caught."[68] Similarly, Bator, in his work on the international trade in art, states that, to be effective, laws must "be specific, reasonable and enforceable".[69] The UNESCO draft convention conforms to these observations in that it limits the implementation of sanctions to the trafficking of UCH retrieved in a manner inconsistent with the Rules of the Annex, rather than in the activity of excavation itself in order to ensure that sanctions are only applied where they will be enforceable.

The elimination of any activity directed at UCH for a commercial purpose would eliminate most activities that may be conducted in a manner not conforming to the Rules of the Annex. The need arises, however, for regulation of non-commercial activities that do not conform with the Rules of the Annex[70]. Ordinarily, the State granted jurisdiction over either the territory in which the UCH was excavated, or the State of which the excavator is a national, will be able to determine the consequences of non-compliance with its regulations. However, the ability of an excavator to avoid these jurisdictional States requires a system that allows a third State to take some action in order to preserve the UCH. As this third State will have neither territorial jurisdiction over the place of the illicit activity, nor nationality jurisdiction over the excavator, the only jurisdiction that it might possess must relate to the object recovered and brought into its own territorial jurisdiction. The convention therefore requires these States to implement a system that prevents illicitly excavated UCH being brought into its territory, and to impose sanctions, including seizure of the UCH, for infringements.

The UNESCO draft proposes a system for the issuing of permits for importation of UCH retrieved in conformity with the Rules of the Annex and the imposition of sanctions for the importation of UCH not so recovered, including its seizure. The Convention also imposes duties on the seizing State with regard to the preservation of the seized UCH and notification of such seizure to interested State Parties. It further provides for a system of conserving and disposing of such seized UCH for the benefit of humankind.

Importation of underwater cultural heritage

Article 8 of the negotiating draft provided for the issuing of permits for the importation of UCH recovered in a manner consistent with the Rules of the Annex[71]. While the issuing of permits allows a State to regulate the importation of UCH, it is not necessary for the convention to include such a specific provision and it is entirely up to a State to determine the manner in which it might fulfil its obligations. There has therefore been some debate over the inclusion of any reference to permits. While the use of a permit system has been welcomed by a number of States, others have opposed the inclusion of

---

[68] Herscher, E., "International Control Efforts: Are There Any Good Solutions?" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press p.123

[69] Bator, P.M., *The International Trade in Art* (1983) University of Chicago Press

[70] Should the commercial recovery of UCH be sanctioned, these regulations would naturally be a most important tool in the preservation of UCH.

[71] The ILA draft convention contained article 9, which reads, "[a] State Party to this Convention may provide for the issuance of permits, allowing entry into its territory of underwater cultural heritage excavated or retrieved after the effective date of this Convention so long as the State has determined that the excavation and retrieval activities have complied or will comply with the Charter." This was amended in the UNESCO negotiating draft to read; "A State Party may [issue][provide for the issuance of] permits, subject to the compliance with [the Rules of the Annex], allowing entry into its territory of underwater cultural heritage." CLT-96/CONF.202/5 Rev.2 1999 p.2

any reference to permits.[72] At the 2000 meeting it was proposed that article 8 might not necessary refer to the issuing of permits, but rather to make it an offence to import UCH recovered in a manner not conforming to the Rules of the Annex[73]. The amended proposal read;

"Each State Party shall take measures to make it an offence to import into its territory underwater cultural heritage [that has been retrieved in the absence of a permit that has been properly issued by a competent authority in accordance with the Rules in the Annex][that has been excavated or retrieved in a manner not in conformity with the Rules of the Annex]"[74]

The use of permits will facilitate the task of ensuring activities directed at UCH are undertaken in accordance to the Rules of the Annex and therefore have a number of benefits in a preservation regime.[75] While the use of permits in article 8 is very limited, as it concerns nothing more than an 'import' permit[76], the inclusion of the text in the first set of brackets suggests that prior approval of an activity directed at UCH is required[77]. If the artefacts are to be landed in a pre-determined coastal State, there seems to be no reason why those undertaking the recovery operation are not able to obtain a permit prior to the operation.[78] Such a system is obviously beneficial for the preservation of UCH in that it enables the authorities of a State to ensure that all the pre-disturbance requirements are complied with and that there are valid reasons for not preserving the UCH *in situ*. Prior permitting is thus an important managerial tool for the preservation of UCH. The permit is an import permit, and not an excavation permit[79].

---

[72] The US in particular, welcomed the establishment of a permit system. The imposition of such an import permit system was to be applied to the importation into the US of artefacts recovered from the *R.M.S Titanic* to be sold for commercial gain. The Bill, however, was never enacted. S.1581, 100 Cong 1st Sess, 133 Cong.Rec. SS.1150-1151 (Aug. 3, 1987)

[73] Canada have favoured the use of permits and proposed in a number of articles that reference to the use of permits be made when referring to the coastal State's regulatory powers. See for example proposal for amendment of article 4, article 5(1) and 5(3), option 1, article 6, option 1, article 7, option 1 and article 8 (CLT-2000/CONF.201/3, Paris, April 2000 pp.8, 9, 10 and 15)

[74] CLT-2000/CONF.201/8, Paris, 5 July 2000. Working Group 2 preferred the term 'Rules of the Annex' to be replaced by the term 'Convention' if the Rules of the Annex were to be regarded as an integral part of the Convention. As this appears to be the most likely conclusion given the results of working group 3, future drafts of this article may refer to the Convention rather than the Rules of the Annex.

[75] For further reading on the use of permits, see McLaughlin *op.cit* pp.149-198; Croome, A., "The United States Abandoned Shipwreck Act Goes into Action - a Report" 21(1) *International Journal of Nautical Archaeology* (1992) pp.39-53. Also see ASA NPD Guidelines

[76] The creation of a permit system must be considered in light of the system of export and import control established under conventional international law. In particular, the 1970 UNESCO Convention establishes a system of controls, which may become operative if the UCH is to be moved from the State to which it was first brought to another State, with the result that two permits may be needed.

[77] The ability of a salvor to meet permit requirements can often act as an endorsement of the salvors professionalism, which in turn may help attract investors. In Florida, commercial salvors have realised that the state permitting process acts as a clearinghouse for all salvors, enhancing a salvors credibility with potential investors. "The regulation requiring documentation also provide numismatic verification and authentication, increasing the value of a find." See Paull IV *op.cit* p.368

[78] Article 8(2) of the secretariat draft originally contained the following provision, "Should an excavation or retrieval of underwater cultural heritage occur without prior authorisation of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter." This article was criticised by a number of States (including Jamaica, Argentina and Cuba, 1999 meeting) as undermining the permit system and this article was subsequently deleted.

[79] The US delegation proposed the provision of excavation permits for excavation in its territorial sea, CZ, EEZ or CS (See CLT-99/WS/8, Paris, April 1999 p.44), or the provision of excavation permits for UCH found beyond its waters and brought into its territory, thus combining both excavation and import permits. (CLT-99/CONF.204/5, Paris, April 1999). The Canadian delegation proposed the following article, "[e]ach State Party shall take measures providing for the seizure of underwater cultural heritage situated in its territory that has been excavated or retrieved in the absence of a permit that has been

As such, it is only applicable to the issuing State, and a permit issued by one State would not ordinarily be accepted by another State. While an excavator could conceivably obtain permits from a number of States prior to recovery, (a form of forum shopping), it does have the advantage of only one State having both issued the permit and allowed entry of the recovered UCH into its territory, thus considering all aspects of the recovery operation, both pre-disturbance and post recovery. It also ensures that only those States that have considered the recovery operation prior to its commencement can validly allow the importation of the UCH recovered.

The negotiating draft had originally included a paragraph allowing a State to permit entry into its territory of UCH without prior approval, on condition that the recovery had been conducted in accordance with the provisions of the Rules of the Annex. This paragraph was deleted, but reincorporated into the first paragraph of article 8, reflected in the second set of brackets. The text in the second set of brackets does not necessarily require prior approval, and the State need only consider the extent to which the UCH has been recovered in compliance with the Rules of the Annex when the UCH is to be imported into its territory. This has the advantage of being administratively less taxing on a State, as the establishment of a permit system may prove to be too onerous an administrative duty for developing States[80]. It does, however make it difficult to determine whether the UCH was indeed undertaken according to the Rules of the Annex. It also opens the door for the issuing of multiple permits by different States, and a system of forum shopping after the recovery of UCH.

Sanctions

Article 9 of the UNESCO Convention states that

"1. Each State Party shall take [criminal, administrative or civil] measures imposing sanctions for the contravention of the measures referred to in article [...].
2. State Parties shall endeavour to co-operate with each other in the enforcement of these sanctions."[81]

While most States have agreed that the imposing of sanctions is a requirement for an effective preservation regime, the nature of these sanctions has been controversial. While the ILA draft referred to penal sanctions, the UNESCO secretariat draft referred to criminal or administrative sanctions. This was further widened by the insertion of the alternative term 'or civil' sanctions.[82] The insertion of these terms in brackets now calls into question whether the nature of the sanctions should be contained in the convention at all. It could be argued that the nature of the sanctions should be included as the sanction imposed in various States will need to be uniform in order to avoid the landing of artefacts in States that may be perceived as having inadequate sanctions, a form of forum shopping.[83] States, however, view the determination of the nature of the sanctions

---

properly issued in accordance with the Rules of the Annex." CLT-2000/CONF.201/3, Paris, April 2000 p.15

[80] It may be for these reasons that one expert at the second meeting of experts stated that "the idea of permits for the importation of underwater cultural heritage into national territory may not be acceptable to every government." CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 para.26

[81] CLT-2000/CONF.201/8, Paris, 5 July 2000. This article was originally article10, while the original article 9 has been renumbered article 10. The original article 10 read, "Each State Party shall impose criminal, administrative [or civil] sanctions for importation of underwater cultural heritage which is subject to seizure under article 9." CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[82] Argentina proposed the inclusion of civil penalties, as it considered that criminal and administrative sanction were too limited. (1998 meeting). See also CLT-99/WS/8, Paris, April 1999 p.49

[83] See Paull IV *op.cit* p.357 regarding the problems of enforcement and policing in Florida state waters.

to be imposed as being a matter solely within their discretion as an exercise of State sovereignty.

Also controversial is the application of sanctions to infringements of other provisions of the Convention other than importation of UCH not recovered in conformity with the Rules of the Annex.[84] The official commentary to the draft states that restricting the imposition of sanctions for the importation of UCH was in order to "avoid controversy that might cripple any attempt to extend penal sanctions to other aspects of the regime."[85] Thus, State Parties are free to determine the extent to which other breaches of this convention shall be punishable. For example, the imposition of sanctions may be implied in articles 6 and 7 of option 1 of the negotiating draft, which requires States to "prohibit the use of their territory" and to take "all practical measures to ensure that their national and vessels flying their flag" do not facilitate the recovery of UCH in a manner not conforming to the Rules of the Annex.[86] Should the nature of the sanctions not be specified in the convention, and therefore not necessarily be as harsh as penal sanction, it may be that the width of the possible infringements may be extended to other provisions of the draft. The weakness of this approach is that it may result in a convention with weak sanctions attached to a number of provisions of the draft, which do not effectively amount to a deterrent to those intent on recovering UCH in a manner not conforming to the Rules of the Annex. It may also result in a plethora of different sanctions applied by different States and result in forum shopping.

Article 10(2) has been subject to some revision. Originally, the duty to co-operate was phrased in mandatory terms and included examples of areas in which States might co-operate, such as the production of documents or extradition.[87] However, the complexities associated with many of these duties, especially that of extradition, proved problematic, and it was eventually agreed not to limit or list the manner in which States might co-operate[88]. As States cannot be required to co-operate, the terminology has been altered to reflect this.

---

[84] The US have proposed that article 10(1) be broadened to include violation of any provision of the convention. The US proposal reads, "[e]ach State Party shall impose criminal or administrative sanctions regarding any violation of this Convention." CLT-99/WS/8, Paris, April 1999 p.49. (see also CLT-99/CONF.204/5, Paris, April 1999). A similar proposal was made by Egypt, which reads, "[e]ach State Party shall impose criminal or administrative sanctions of all violations of the provision of this Convention." CLT-2000/CONF.201/3, Paris, April 2000 p.15. These proposals are, however, difficult to interpret, as many of the provisions of the convention pertain to States, and not individuals, whilst the Rules of the Annex are drafted in such a way that they are Rules which pertain to individuals, though States are duty bound to implement these Rules.

[85] CLT-99/WS/8,Paris, April 1999 p.49. It should be noted that the secretariat draft included, in article 5(5) the obligation for the coastal State, if granted regulatory powers within its EEZ and CS, "to make punishable all breaches of the terms of permits authorising the conduct of activities affecting underwater cultural heritage." This obligation was subsequently deleted from the negotiating draft, and States are simply required to ensure that recoveries in these areas are conducted according to the Rules in the Annex. (article 5(2), Option 1, CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.5).

[86] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.5

[87] Article 10(2) of the secretariat draft stated that; "States Parties agree to co-operate with each other in the enforcement of these sanctions. Such co-operation shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition." CLT-96/CONF.202/5 Paris, April 1998. A number of States have argued that article 10(2) is problematic, and should be deleted. This includes, Canada, France, US and Argentina.

[88] The complex nature of extradition proceedings is evident in the process of extraditing the former Chilean Dictator General Augusto Pinochet to Spain. See for example Steiner, H.J. and Alston, P., *International Human Rights in Context: Law, Politics, Morals*" 2nd ed. (2000) Oxford University Press pp.1198-1216

A further concern with this article is that it may have retrospective application. It may be difficult to determine whether UCH was recovered before or after the coming into force of the UNESCO convention. This will naturally occur in an excavation that could take a number of years to complete, some stages of which occurred before the coming into effect of the UNESCO convention. The risk is that a salvor may be subject to sanctions for an activity that did not constitute an offence at the time it was committed only because it is indistinguishable from the current activity.

Seizure

A sanction for the importation of UCH contrary to article 8 is specified in article 10(1) of the convention, which states;

"[e]ach State Party shall take measures providing for the seizure of underwater cultural heritage brought into its territory and [that has been retrieved in the absence of a permit that has been properly issued by a competent authority in accordance with the Rules in the Annex][that has been excavated or retrieved in a manner not in conformity with the Rules of the Annex]" [89]

Subject to the determination of whether a permit system will be specified in article 8, State parties are under a duty to 'take measures for the seizure' of UCH. The requirement that the State take measures to seize UCH, rather than simply to seize UCH reflects the reluctance of State to be bound to achieve a result, which in practical terms might not be achievable. Originally it was proposed that this would occur whether the UCH had been brought into the territory of the State Party directly or indirectly. Thus, the duty to take measures to seize such UCH would apply irrespective of whether it was recovered and imported directly into the State or imported from another State.[90] This provision is similar to that provided for under the UNIDROIT convention and the 1954 Hague Protocol.[91] Although this original position is no longer specified in article 10, it may be implied.

While article 10(1) certainly provides for seizure of UCH in contravention of article 8, the wording of article 10(1) is broader than that of article 8, so that the duty to take measures to seize such UCH applies not only when the UCH is imported but simply when it is brought into the territory of the State. Thus, while UCH recovered in a manner not conforming to the Rules of the Annex are not to be imported, but are found on a vessel within the State's port, the Sate is duty bound to seize this UCH. This

---

[89] Article 9(1) of the secretariat draft stated that "[s]ubject to Article 8, each State Party shall provide for the seizure of underwater cultural heritage excavated or retrieved in a manner not in conformity with the operative provision of the Charter, which is brought to its territory, either directly or indirectly." CLT-96/CONF.202/5 Paris, April 1998. The negotiating draft article 9(1) was substantially similar, with only the phrase "either directly or indirectly" erased. CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[90] CLT-99/WS/8, Paris, April 1999 p.48. Article 9(2) of the negotiating draft stated, "[a] State shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Article 5 paragraph 2 to 5 above only after the request or with the consent of that State." The duty to take measures to seize UCH recovered in a manner inconsistent with the Rules in the Annex apply to UCH recovered in all maritime zones beyond the territorial jurisdiction of the coastal State. Article 9(2) therefore provides that, in areas where the coastal State does exercise jurisdiction, the right to seize UCH recovered from these maritime zones will only arise at the request of the coastal State. It is, however, unnecessary to include a paragraph specifically dealing with these zones, and that all zones beyond the territorial jurisdiction of the coastal State will fall within the scope of article 9(1). A number of States supported the elimination of an article dealing with any specific zones, including Argentina and Canada. (1999 meeting), and as such, article 9(2) was deleted. CLT-2000/CONF.201/8, Paris, 5 July 2000

[91] Article 2. See CLT-99/WS/8, Paris, April 1999 p.48

provision calls into question the basis of such State jurisdiction. Ordinarily a State may not take any action in respect of offences taking place outside its territorial jurisdiction. Exceptions, however, apply in the case of maritime pollution and with regard to fish stocks[92]. However, in the case of illicitly excavated UCH, the offence that justifies seizure is not the offence of the illicit excavation, but rather of having brought the illicitly excavated UCH into the coastal State's territory. It is thus akin to importation. There should therefore be no question of such a duty amounting to extra-territorial jurisdiction.

A further problem arises when the UCH, that has been seized by a particular State, has an identifiable owner. The national laws of the State will therefore have to determine the rights of the owner in these circumstances.[93]

When exercising the right to seize artefacts in accordance with article 10(1), a State Party is under a duty to "record, protect and take all reasonable measures to conserve" the UCH[94]. Conservation of marine artefacts can be a costly and time-consuming activity, and to require all State Parties to provide such a facility may, at first sight, appear to be an onerous burden. Article 10(2) therefore does not impose a mandatory duty, but rather requires a coastal State to take all 'reasonable' measures to conserve artefacts. Reasonable will depend on the coastal State's infrastructure, technical expertise and facilities etc. However, given that this would only occur in cases of violations of article 10(1), this occurrence would be exceptional. Developing States may need the expertise of UNESCO and other interested States if the artefacts in these situations are to be conserved. Thus, article 10(3) requires the seizing State to notify all other States which might have an interest in the UCH of its seizure, as well as UNESCO, and co-operate for the conservation of the UCH.[95] Article 11(2) of the negotiating draft, from which article 10(2) has its origins, used the phrase "State Party which is known to have a cultural heritage interest therein" to describe the State to which the seizing State should make notification of the seizure of UCH. It has been noted that it is often difficult to determine which State might have a cultural heritage interest in an item of UCH, and that the administrative burden on the seizing State to determine such interest and make such notifications may be particularly onerous. It is unfortunate that the terminology in article 10(3) has reverted to that used in article 149 of UNCLOS, which provides little assistance to States in determining which State

---

[92] See article 23 of the Straddling Fish Stocks Agreement and article 218 of UNCLOS. See also CLT-99/WS/8, Paris, April 1999 p.48

[93] In this case, the choice-of-law rules will be determined by the national courts. Questions of ownership of a vessel will ordinarily be determined by the law of the Flag State, while questions of ownership of the cargo will be determined by the law of the nationality of the owner, if known, or the flag of the vessel on the assumption that an owner of the cargo would be a national of the Flag State. See further CLT-99/WS/8, Paris, April 1999 p.48. See further CLT.99/CONF.204/CLD.10 for an alternatively worded article proposed by the Chairperson of the 1999 meeting.

[94] Article 10(2) (article 11(1) of the negotiating draft) reads in full, "[e]ach State Party shall record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention." CLT-2000/CONF.201/8, Paris, 5 July 2000

[95] Article 10(3) reads in full as follows, "[e]ach State Party shall notify any seizure of underwater cultural heritage that is made under this Convention to the Director-general of UNESCO and to the State of origin, State of cultural origin or State of historical origin and archaeological origin [provided that such a State is a State party to this Convention]." This article has its origins in Article 11(2)of the secretariat draft, which reads, "[e]ach State Party shall notify its seizure of underwater cultural heritage under this Convention to any other State Party which is known to have an interest therein" (CLT-96/CONF.202/5 Paris, April 1998.) and article 11(2) of the negotiating draft, which reads "[e]ach State Party shall notify its seizure of underwater cultural heritage under this Convention to [the Director-general of UNESCO] and to any other State Party which is known to have a cultural heritage interest therein".(CLT-2000/CONF.201/8, Paris, 5 July 2000.)

should be notified of a seizure of UCH. This system of notification has also been criticised as being too bureaucratic, and that direct notification to a central authority would be administratively more efficient.[96] It is also unfortunate that the term 'protect' was used rather than the more precise term' preserve'.

Having 'recorded, protected and conserved' the UCH, the Seizing State will have to decide on the ultimate disposition of these artefacts. Article 10(4) provides that;

"[a] State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit taking into account the needs of conservation and research, the need for re-assembly of a dispersed collection, public access, exhibition and education and the interests of any State which has expressed an interest, including the State of origin, State of cultural origin or State of historical and archaeological origin. [When archaeological or historical assets are related to the historic or cultural heritage of another State Party, a joint decision will be taken by the two States as to the resting place of these assets being mindful of the preferential rights of the State of cultural, historic or archaeological origin.]"[97]

Once again, the influence of article 149 of UNCLOS can be seen in this article. Originally, the secretariat draft attempted to avoid using the ambiguous wording of the latter when referring to the interest of other States[98]. It therefore referred to States with a 'national heritage interest' in the UCH[99]. However, the negotiating draft included the use of the wording similar to article 149.[100] Although these States should be taken into account by the seizing State when determining the manner of the UCH's disposition, it is uncertain exactly what consideration they can expect. The duty is simply to take them into account[101]. Some attempts have been made to give this duty a more precise interpretation. Spain, for example, wished the State of historical or cultural origin to be specifically included in the decision making process and decision regarding the disposition of the UCH would only be made by 'joint agreement'.[102] Given the difficulties of determining which States might be party to such a joint agreement, it is submitted that such a system would be unworkable, and invite disputes.

While it may be unfortunate that article 10(4) mimics article 149 in some respects, it may have been useful had it mimicked article 149 in certain other respects. Whereas article 149 uses the term 'benefit of mankind', article 10(4) simply refers to the 'public interest'[103]. This may be interpreted in a narrow sense to refer to the public interest of the State seizing the UCH. As this UCH would have been recovered in a maritime zone beyond the territorial jurisdiction of the seizing State, it is submitted that humankind

---

[96] CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 para.28, The Latin and Caribbean Group proposed that the seizing State should notify a "competent international organisation which in turn will notify the other member States." CLT-99/CONF.204/5, Paris, April 1999

[97] CLT-2000/CONF.201/8, Paris, 5 July 2000. Article 12(1) of the secretariat draft provides that "[a] State Party which has seized underwater Cultural Heritage shall decide on its ultimate disposition for the public benefit taking into account the needs of conservation and research including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education and the interests of those States which have expressed a national heritage interest in it." CLT-96/CONF.202/5 Paris, April 1998

[98] CLT-96/CONF.202/5 Paris, April 1998

[99] It has been pointed out that in articles 11(2) and 13(1) of the secretariat draft, the term used is 'cultural heritage interest' rather than 'national heritage interest'. This, however, has been subscribed to a drafting oversight, and will presumably be rectified in a final convention. It has been suggested that the term 'cultural heritage interest' is preferable to 'national heritage interest'. See further CLT-99/WS/8, Paris, April 1999 pp.53-54

[100] CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[101] See CLT-99/WS/8, Paris, April 1999 p.55 for further discussion on this article

[102] CLT-99/CONF.204/5, Paris, April 1999

[103] CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 para.29

should have an interest in the UCH and that the terminology in article 10(4) should be altered to coincide with that of article 149.

A number of States raised the question of the restitution of UCH recovered in a State's territorial waters, and removed to another State's, where it has been seized.[104] The restitution of UCH is a complex legal issue. Unlike terrestrial cultural heritage, which ordinarily has to be smuggled through custom and exercise control in order to transport the cultural heritage to another State, UCH can be more easily recovered and exported without those responsible ever having to come ashore. This makes policing an extremely difficult task, especially in those coastal States without water-born enforcement personnel. As most States will not enforce the public laws of another State in the absence of any treaty with the other State, the UCH will not be restituted unless the State can prove ownership of the UCH.[105] For example, in *Attorney-General of New Zealand v. Ortiz*[106], Ortiz had exported five historic Maori wood panels from New Zealand to UK for auction, contrary to New Zealand's export laws. The court refused to enforce the New Zealand legislation. Lord Denning MR, in rejecting the notion of legislative extra-territoriality, stated, "no country can legislate so as to affect the rights of property when that property is situated beyond the limits of its own territory"[107]. A similar case has recently arisen concerning UCH. In 1998, the South African National Monuments Council became aware of a number of gold coins on auction in the UK which were purported to come from a wreck which lies in South African territorial waters[108]. No export permit had been granted by the South African Government, and it

---

[104] Both Syria and Peru were concerned with the restitution of UCH removed from the territory of a State party. (1998 meeting). The Syrian delegation remarked that "amongst measures to protect underwater cultural heritage, international co-operation should be improved to promote the return of cultural property discovered in areas under State jurisdiction and to forbid illicit traffic of such goods..." CLT-99/CONF.204/5, Paris, April 1999. Similarly, Mexico suggested that each State party be required to impose sanction on any person responsible for the wrongful removal of underwater cultural heritage from its territory. CLT-2000/CONF.201/3, Paris, April 2000 p.14

[105] UK law also restricts the export of UCH found in UK territorial waters. Section 245 Merchant Shipping Act 1995 states that it is a criminal offence, punishable on conviction on indictment with imprisonment for a term not exceeding five years, to take wreck into a foreign port and selling it which was stranded, derelict or otherwise in distress found on or near the coasts of the UK.

[106] [1982] 3 W.L.R 570

[107] *Ibid* at 580

[108] On 29 September 1997, *The Times* published an article entitled "Clive of India's Gold Found in Pirate Wreck" which advertised the imminent auction of 1200 gold coins. Clive's gold had, however, been lost on board the vessel *Doddington* that had been wrecked in South African territorial waters. The wreck had been discovered in 1977, and recovery of artefacts from the wreck had been subject to a permit issues by the South African Monuments Council. The National Monuments Act (Amendment) 1986 provides that all wrecks over 50 years old are protected, making it an offence to interfere with, disturb, destroy, damage, alter or export from the Republic any cultural heritage without a permit. The National Monuments Council had not, however, issued a permit for the exportation of these coins, and the current excavation permit holders did not appear to be the parties who had put the coins up for auction. Those who had put the coins up for auction have not been identified, and claimed that the coins were not found on the wreck of the *Doddington*, but on a wreck believed to be a pirate vessel, which they claimed to have found accidentally in international waters. The implausibility of this claim is best described in the words of the maritime archaeologist from the National Monuments Council; "The extremely implausible implication is, therefore, that Clive's gold was recovered from the *Doddington* by pirates not long after the vessel was wrecked, was lost again when the vessel foundered, only to be found, quite by chance, by modern divers. On top of that, the press report claimed that the wreck in question lay in international waters, thereby neatly and fortuitously placing it outside the jurisdiction of the adjacent coastal state. ...At this distance from the South African east coast, average water depth is around 200 meters, ruling out conventional diving, and requiring extremely sophisticated and expensive equipment and skills. Furthermore, to stumble across the wreck of a small wooden vessel (probably not much more than 30 meters in length) on a virtually limitless expanse of seabed is extremely unlikely" The discoverers of the coins refused to divulge either their identity or the location of the pirate vessel. The National Monuments

appears as if the coins had been illegally exported. However, as UK courts will not give effect to South African legislation, the National Monuments Council have not been able to recover the UCH on the grounds of its illegal exportation.

The reasons for not providing for the restitution of UCH in these circumstances has been that the UNESCO draft is intended to apply to UCH found in maritime zones beyond State territorial waters, and as such, is therefore not designed to deal with the issue of restitution.[109] However, as this involves an international element, in that the recovery of the UCH and its seizure takes place in different jurisdictions, the UNESCO draft offers an opportunity to regulate in this matter[110].

Conclusion

The use of coastal State jurisdiction over its ports, the issuing of permits and the imposition of sanctions, including the power to seize UCH, are intended to be a disincentive for salvors undertaking recovery operations in a manner inconsistent with the Rules in the Annex from landing the UCH in the coastal State. Whilst it is clear that these articles requires further consideration in order to construct an adequate preservation regime and which clearly imposes clear duties on State Parties, the extent of these changes will be dependent on the outcome of deliberations concerning the exclusion of salvage law or the exclusion of any commercial incentive to recover UCH. Should the recovery of UCH in conformity with the Rules of the Annex be sanctioned, the regulatory system will require clear provisions to ensure that the Rules of the Annex are complied with. Weak provisions which do not provide for a system of global preservation, in which all State parties implement similar permit requirements, sanctions and seizure policies may result in forum shopping and an ineffective implementation of the Rules in the Annex.

National services, education and training

National services

The preservation of the world's cultural heritage requires every State to participate in the collective preservation infrastructure. In order to do so, it is ordinarily required of trustee States that they establish national services for the preservation of this heritage[111], including the call to establish national inventories.[112] For

---

Council therefore decided to pursue a claim for the restitution of the coins. The auction House in London took the coins off the auction and refused to deliver them back to the discoverers pending a decision. An out of court settlement was reached and a portion of the coins have been returned to South Africa. See Gribble, J., *The Doddington Gold Coins* paper presented at the World Archaeological Congress, University of Cape Town, South Africa 10-14th January 1999. The wrecking and discovery of the *Doddington* are recounted in Allen, G and Allen, D., *Clive's Lost Treasure* (1978) Robin Garton.

[109] For a further discussion, see CLT-99/WS/8, Paris, April 1999 p.54

[110] The 1985 European draft convention may prove helpful in this regard. Article 14 states "[e]ach contracting State shall take all practical measures towards the restitution of underwater cultural heritage located within that State, which has been illegally recovered in the area of another contracting State or illegally exported from such a State." See CLT-99/WS/8, Paris, April 1999 p.55

[111] See for example, articles 12-17 of the 1972 UNESCO Recommendation Concerning the Protection at National Level of the Cultural and natural Heritage; articles 5, 13 and 14 of the 1970 UNESCO Convention; articles 7 and 15 of the 1954 Hague Convention; article 5 of the World Heritage Convention; article 5(a) of the 1956 Recommendations; and articles 15-19 and 20-21 of the 1968 UNESCO Recommendations. See Appendix VII

example, the 1970 UNESCO Convention requires each State Party to establish a national service for the protection of cultural heritage, where such services do not already exist.[113] However, this duty is mitigated by the inclusion of the phrase 'as appropriate for each country'. There is therefore no standard to which these national services should comply. Similarly, the duty to take measures to protect cultural heritage, including the setting up of national services, contained in the World Heritage Convention is subject to the State's resources[114]. This may, however, be beneficial to developing States that could not possibly establish national services to the extent that developed States such as the US could, while still requiring those States to do whatever they possibly can. This problem is recognised in the 1972 World Heritage Convention, which states that "protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technological resources of the country where the property to be protected is situated." With the recognition of the cultural heritage as that of humankind, the convention recognises the responsibility of the international community to assist the State in whose territory the cultural heritage is situated, hence the development of the World Heritage Fund in addition to the services ordinarily provided for by UNESCO. Thus article 7 of the 1972 World Heritage Convention reads;

> "For the purposes of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance to support State Parties to the Convention in their efforts to conserve and identify that heritage"

The preservation framework therefore ordinarily requires States to act as trustees of the cultural heritage and to establish the services necessary to effectively preserve this heritage. However, as the trustee States are not normally financially and technically equipped to protect the cultural heritage, the obligation to establish the necessary national services, though mandatory, leaves a great deal of discretion to the trustee State as to the manner in which it conforms to the mandatory requirements. This, unfortunately, means that, often, different standards apply in different States, with little uniformity.

---

[112] Article 5(b) of 1970 UNESCO Convention, article 29 of the 1972 UNESCO Recommendation and article 4(2) 1969 European Convention.

[113] Article 5 of the 1970 UNESCO Convention states that; "[t]o ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions: (a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property; (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage; (c) promoting the development or the establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property; (d) organising the supervision of archaeological excavations, ensuring the preservation 'in situ' of certain cultural property, and protecting certain areas reserved for future archaeological research; (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules; (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention; (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property."

[114] Article 5 of the World Heritage Convention includes the phrase " in so far as possible" when referring to this State duty.

National services in the UNESCO draft convention

In order to effectively implement the convention, State Parties are required to improve existing national services, where appropriate, or, if no national service exists, to establish such a service[115]. This would appear to be a mandatory requirement creating an international obligation. The latter case applies in particular to developing States that have yet to establish any preservation regime or regulation over the recovery of UCH. This creates some concerns regarding the ability of developing States to meet this requirement. Concerns have also been expressed concerning the existing national services in some States which do not have a sufficiently developed infrastructure, or which are unrelated to the preservation of UCH[116], to ensure that the provision of the convention are implemented.

Unfortunately, the establishment of such national services requires expertise and government financing, which may be difficult for many developing States, particularly in light of the low priority UCH traditionally has for State administrations[117]. Although UNESCO is able to provide some technical expertise, it is unable to provide the financial aid necessary to establish appropriate national services, which would include conservation laboratories, employment of appropriately qualified personnel and administrative infrastructure. The latter will include the responsibility of issuing permits[118], reporting and notification of finds to UNESCO and other interested States[119], collaboration and information sharing on finds[120], establishment of educational[121] and training facilities[122], policing port facilities and seizure of items imported without a permit, or in a manner not in conformity with the Rules of the Annex[123] and the imposition of sanctions for breaches of the national laws implementing the provision of the convention[124].

The establishment or improvement of national services, while mandatory, is couched in terms which allows a great deal of discretion to States as to the form such services might take. The services are, however, required to be designed in such a way that the effective protection, conservation, presentation, management, research and education regarding UCH can be achieved. While these terms may be susceptible to differing interpretations, given the differing resources of different State, they will need to be

---

[115] Article 17, headed 'national Services', states, "[i]n order to ensure the proper implementation of this Convention, State Parties shall establish national services, where such services do not exist, or to improve existing ones when appropriate, with the aim of providing for the effective protection, conservation, presentation., management, research and education regarding underwater cultural heritage." CLT-2000/CONF.201/8, Paris, 5 July 2000 . Article 18(1) of the negotiating draft was substantially similar, providing that "[i]n order to ensure effective implementation of this Convention, State Parties undertake to expand the activities of existing national services or, if appropriate. to establish national services for that purpose." CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.12. Similar provisions are contained in article 5 of the 1970 UNESCO convention and article 5(b) of the 1972 World Heritage Convention.

[116] A number of States rely on government departments or agencies to enforce cultural heritage legislation even though their primary function is unrelated to this function. In the UK for example, the coastguard fulfils a function in regard to the enforcement of the Protection of Wrecks Act 1973.

[117] Jamaica was particularly concerned with the difficulties in establishing such a national infrastructure. (1999 meeting)

[118] Article 8

[119] Article 10(3), previously article 11 of the negotiating draft.

[120] Article 12, previously article 13 of the negotiating draft.

[121] Article 14, previously article 15 of the negotiating draft

[122] Article 15, previously article 16 of the negotiating draft.

[123] Article 10, previously article 9 of the negotiating draft.

[124] Article 9, previously article 10 of the negotiating draft.

interpreted in such a way that they conform to the Rules of the Annex. Negotiations have indicated a reluctance to impose on States certain duties which may be regarded a falling within the sole discretion of States as a function of their sovereignty, and thus not suitable for inclusion in an international convention. For example, in order to facilitate the determination of breaches of the terms of the convention, and in particular, the Rules of the Annex, the negotiating draft included a provision requiring State Parties to establish an internal procedure for resolving disputes concerning whether or not an activity directed at UCH is in conformity with the Rules in the Annex.[125] This article was subsequently deleted as it was regarded as a matter within the sole discretion of States. It could also be argued that the establishment of such a service is implied given the duties of States in article 9 and 10 of the convention.

Education

Education concerning the importance of the cultural heritage and respect for the cultural heritage of all nations as they make up humankind is the most important mechanism for preservation.[126] Most of the international instruments for the preservation of cultural heritage therefore recognise the importance of education and require State Parties to undertake educational programmes to highlight the importance and dangers posed to cultural heritage. For example, article 7 of the 1954 Hague Convention requires the State Party to "introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present convention and to foster in the members of the armed forces a spirit of respect for the culture and cultural property of all peoples."[127] This educational requirement is reinforced and widened in the second protocol to the 1954 Convention, which requires States Parties to "strengthen appreciation and respect for cultural heritage by their entire population"[128] Similarly, the 1970 UNESCO Convention requires States to take "educational measures to stimulate and develop respect for the cultural heritage of all States..."[129]. Educational measures are favoured over penal measures, as is evident in article 10, which requires States to "restrict by education, information ... movement of cultural heritage illegally removed from any State Party..." This sentiment is also evident in the 1956 UNESCO Recommendation[130]. The need to educate the public of the importance of UCH was highlighted in the Roper Report, which, when listing the problem areas which need to be addressed in order to preserve the UCH was "improving public's awareness of the underwater cultural heritage"[131]

---

[125] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.12. Article 18(3), read; "State Parties shall establish an internal procedure or procedures for resolving disputes concerning whether or not an activity affecting underwater cultural heritage is in conformity with the operative provisions of the charter."

[126] See Article 10 1970 UNESCO Convention and article 12 1956 UNESCO Recommendations. The 1992 European Convention highlights the importance of education and public awareness in the protection of cultural heritage when, in the preamble, is states that the heritage "is seriously threatened with deterioration because of insufficient public awareness." See also Herscher (1989) *op.cit* p.123, who states that "detection and deterrence of looting at remote sites is difficult; educating the public and reducing the demand for illicit objects may hold more promise."

[127] Similarly, article 25, entitled "dissemination of the convention" requires the State Party to "include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property."

[128] Article 30(1) of the Second Protocol 1999

[129] Article 5(f) of the 1970 UNESCO Convention

[130] Article 12

[131] Doc. 4200-E, Strasbourg, 1978; see also Gifford, J. Redknapp, M. and Fleming, N., "UNESCO International Survey of Underwater Cultural Heritage" 16 *World Archaeology* (1985) pp.374

Educating the public of the importance of UCH, and the discipline of underwater archaeology is regarded as an important tool for the preservation of UCH. An aspect of this educational policy is to "change the public image of looters as adventurous persons which bring to surface treasures from the past".[132] While it may appear that this educational policy is an attempt to legitimise underwater archaeology to the public, it is, rather, a provision for the dissemination of information on the value of UCH. It is thus more than simply a public relations exercise, but a genuine educational policy. The preamble to the convention therefore requires that information and multi-disciplinary education about UCH, particularly its historical significance and the dangers that threaten it, be made available to the public. It will be important that the manner in which this information is disseminated is not viewed as a public relations exercise, but enables the public to make their own informed judgements about UCH. A criticism levelled at the archaeological community is that excavation reports and academic information of the archaeological value of UCH is often either not disseminated to the public, or when it is, is written in a style and format not appropriate for broad public dissemination. The salvage community, however, often rely on the sale of books[133], video's and articles as a public relations exercise and to raise funds. The salvage community has thus been able to communicate its perception of the value of UCH to the public, often resulting in the public viewing the salvage community in a more favourable light that the archaeological community.

Education and training in the UNESCO draft convention

Article 14 of the convention has received little comment or been the subject of much negotiation at the meeting of experts, yet it contains arguably the most important tool for the preservation of UCH.[134]

Article 14 states[135];

"[e]ach State Party shall take practical measures to facilitate the education of the public regarding the value and significance of underwater cultural heritage and the importance of protecting it under the Convention."[136]

As it would be impossible to determine the outcome of an educational process, the article simply requires a State to take all practical measures to facilitate the education of the public[137]. Education could include formal training[138], exhibitions of recovered UCH,

---

[132] CLT-99/WS/8, Paris, April 1999 p.62. See for example, Davies, T., "Going for Gold" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO pp.258-263

[133] These include, for example, Robinson, C.M., *Shark of the Confederacy: The Story of the CSS Alabama* (1995) Leo Cooper, London; Cussler, C., *The Sea Hunters* (1996) Simon and Schuster, London; Miller, D., *The Wreck of the Isabella* (1995) Leo Cooper, London; Ballard, R.D., Explorations: An Autobiography (1995) Weidenfeld and Nicolson, London; Kayle, A., Salvage of the Birkenhead (1990) Southern Book Publishers, Johannesburg; Beasant,J., *Stalin's Silver* (1995) Bloomsbury, London

[134] See Paul IV *op.cit* pp.358 regarding education programmes in Florida.

[135] Article 15 of the negotiating draft provided that; "[e]ach State Party shall endeavour by educational means to create and develop in the public mind a realisation of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex." CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.11

[136] CLT-2000/CONF.201/8, Paris, 5 July 2000. While the language of article 14 differs to that of article 15 of the negotiating draft, the substance of the article has not changed. The language of article 14 conveys the essence of article 15 in a simpler format.

[137] Similar provisions are contained in article 24 of the 1972 World Heritage Convention, article 25 of the 1954 Hague Convention and article 10(b) of the 1970 UNESCO Convention.

production of information leaflets and the provision of background material for journalists.

The mandatory requirement of creating an educational policy would supplement the mandatory requirement to establish a training policy[139], which would provide sufficient training in investigation and excavation methods and techniques for the conservation of UCH.[140] Although the imposition of an educational policy is to be welcomed, the establishment of training facilities such as those envisaged in article 15 are not only extremely expensive but also highly technical.[141] Very few developing States have the resources or expertise to establish such facilities.[142] Many of these States will require aid from developed States, particularly those with a rich tradition in underwater archaeology and UCH conservation. It should be noted that articles 14 and 15 impose binding obligations on State Parties to "take all practical measures to facilitate" education and "endeavour to co-operate" in the provision of training. Thus, while States are bound to formulate both educational and training policies, the extent to which States are able to achieve practical results will be dependant on each particular State's infrastructure, financial capabilities, technical expertise etc[143].

Article 15 includes an obligation to endeavour to co-operate in the transfer of technology relating to UCH. This is an important requirement for developing States as the technology for archaeological investigation in deep waters is extremely complex and expensive[144]. It is, however, unlikely that some States will allow the transfer of certain technology related to activities directed at UCH where the technology is connected with the defence industry. For example, Dr Robert Ballard has made extensive use of US naval vessels and technology, particularly the nuclear submarine NR-1 to search for UCH.[145]

Conclusion

Provision for education and training were regarded by experts at the second meeting "as crucial, particularly owing to the lack of specialised archaeologists and technicians, as well as resources for their training in a number of developing countries."[146] Education of

---

[138] A very successful educational and training programme is run by the Nautical Archaeological Society, based in the UK, and run in a number of States, including the US, South Africa and Australia. See further http://www.nasportsmouth.org.uk

[139] See Dromgoole, S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom* (1993) Unpublished PhD Thesis, University of Southampton p.5-12 and 5-45

[140] Article 16 reads; "State Parties shall take measures to further research in accordance with the operative provisions of the Charter by providing training in underwater archaeological investigation and excavation methods and in techniques for the conservation of underwater cultural heritage, or by encouraging the competent bodies or organisations to do so." Similar provisions are contained in article 5(e) and 22(e) of the 1972 World Heritage Convention and article 25 of the 1954 Hague Convention.

[141] Article 16 reads as follows; "State Parties shall endeavour to co-operate in the provision of training in underwater archaeological investigation and excavation methods, in techniques for the conservation of underwater cultural heritage, and in the transfer of technology relating to underwater cultural heritage" CLT-2000/CONF.201/8, Paris, 5 July 2000

[142] Saudi Arabia, for example, has no qualified underwater archaeologists. (1999 meeting)

[143] Egypt opposed the mandatory nature of this duty and proposed that 'should' replace 'shall' in article 16(1) and 16(2). CLT-2000/CONF.201/3, Paris, April 2000 p.16

[144] The technology utilised in deepwater archaeological excavations is similar to that utilised for Marine Scientific Research, and provided for in article 266 of UNCLOS.

[145] See "Titanic man finds world's oldest ships 1,000ft down" *The Sunday Times*, June 27, 1999

[146] CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 para.41

the public was also considered crucial, particularly in regard to counter acting the public relations role of the treasure salvage community, which some considered included "the dissemination of deceptive scientific research incompatible with scientific principles."[147] Given the difficulties of developing countries to develop national services, and implement many of the provision of the draft convention, and given the international nature of UCH, it is essential that the preservation regime establish an effective and efficient co-operative mechanism[148].

International co-operation in the preservation of underwater cultural heritage

As discussed in chapter 2, the preamble of the convention provides the framework and context within which the substantive provisions of the convention can be interpreted. Acknowledging the importance of UCH as an integral part of the cultural heritage of humanity[149], and that it should therefore be preserved for the benefit of humankind, the preamble recognises that responsibility for the preservation of UCH rests with all States[150] and that co-operation amongst States is therefore essential for the preservation of UCH[151]. The preservation regime proposed in the negotiating draft, and recent proposals by a number of States, are underpinned by this principle of co-operation, formulated originally in article 303(1) of UNCLOS. This principle has been proposed as a substantive principle of the Convention as well as a rule of the Annex.[152] While States are generally under a duty to co-operate, it has been recognised that sovereign States cannot be forced to co-operate and that, at best, they should be under a duty to endeavour to co-operate in relation to specific outcomes. Thus, the draft, for example requires State to "endeavour to co-operate with" each other on the protection and management of underwater cultural heritage[153], in the enforcement of sanctions[154] and in the provision of training.[155]

International co-operation is a *sina qua non* for the realisation of a number of values attributed to UCH. The conclusion reached in Chapter 1 was that one of the values attributable to the cultural heritage includes its capacity to further international understanding and co-operation. The exchange of cultural heritage and the free flow of ideas and information helps one nation to understand another, lessening global conflict, and allowing international co-operation in a variety of fields[156]. In order to achieve this, however, a certain degree of international co-

---

[147] *Ibid*

[148] The Group of 77 stated that "the convention can only be effective if a sufficient level of human and technological resources for appropriate protection of underwater cultural heritage can be assured; therefore the Convention should provide a system of capacity building, transfer of technology and training related to protection." CLT-2000/CONF.201/3add, Paris, June 2000 p.10

[149] CLT-96/CONF.202/5 Rev.2, Paris, July 1999, para. 1

[150] *Ibid* para 8

[151] *Ibid* para 6

[152] Rule 36 of the Rules of the Annex reads, "[i]nternational co-operation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further effective exchange or use of archaeologists and other relevant professionals." Some States have stated that such a principle should appear in the Convention, rather than in the Annex, as is reflected in the negotiating draft. Comments of the US on selected articles being considered by working group distributed at 2000 meeting.

[153] CLT-2000/CONF.201/8, Paris, 5 July 2000, article 12

[154] *Ibid.* article 9

[155] *Ibid.* article 15

[156] In order to foster the understanding of different cultures and the development of a cultural heritage of humankind, conventional international law has developed the principle of the free flow

operation is needed in order for cultural exchanges to begin this process. Similarly, in the case of the illicit trafficking of cultural heritage, international co-operation is the backbone of any protective regime, and as such, criminal sanctions imposed are often minimal.[157] International co-operation is also essential for the protection of the cultural heritage from damage and destruction, and covers a wide range of measures, including "financial, artistic, scientific and technical." aid.[158] This international co-operation is arguably the most fundamental principle upon which any preservation regime can be based, and it is specifically encouraged in most of the international instruments.[159]

This duty to co-operate has crystallised in a more concrete form in two provisions of the draft convention, namely, in the collaboration of certain activities directed at specific UCH, and the development of regional agreements.

Collaboration and Information -Sharing

Article 12 of the UNESCO convention, on collaboration and information sharing, reads as follows[160];

1. State parties shall endeavour to co-operate with and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practical, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.
2. To the extent compatible with the purposes of this Convention, each State party shall share information with other States Parties concerning underwater cultural heritage, including discovery of

---

of information and ideas. This principle has taken form in the 1950 UNESCO Agreement on the Importation of Educational, Scientific and cultural Materials, 131 U.N.T.S 25 (Florence Agreement). The preamble of the Florence agreement states that "the widest possible dissemination of the diverse forms of self-expression used by civilisations are vitally important both for intellectual progress and international understanding, and consequently for the maintenance of world peace" This interchange is to be accomplished "by means of books, publications and educational, scientific and cultural material." The Florence Agreement provides for the free movement of a number of objects, including cultural heritage. This instinctively would appear to be at cross-purposes with conventional international law that attempts to control the movement of cultural property, such as the 1970 UNESCO Convention. However, the aims of the conventions are distinct and reinforce the underlying principle of cultural heritage as the common heritage of humankind. The 1970 UNESCO Convention involves problems of one State loosing its national cultural heritage to another State, while the Florence agreement involves problems of one State preventing the inflow of ideas, knowledge and cultural heritage into its territory. Subject then to the assurance that the State of origin has control over the movement of its cultural heritage, the cultural exchange from one State to another is encouraged. The 1970 UNESCO Convention specifically recognises the importance of cultural exchanges in its preamble. For a discussion on the history of the negotiations of the Florence Agreement see Edwards, J.F., "Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects" 22 *University of Toledo Law Review* (1991) pp.919-953. This encouragement of cultural exchanges in a number of other international instruments, including; article 303 of UNCLOS which, in expanding coastal State jurisdiction over UCH found in the contiguous zone, maintains all right in respect of cultural exchanges. Similarly, article 23(c) of the 1956 UNESCO Recommendation encourages the exchange of duplicate items of cultural heritage to public institutions.

[157] Nafziger *op.cit* p.838

[158] Article 4 of the World Heritage Convention

[159] See for example, articles 13-20 1956 UNESCO Recommendation;

[160] Article 12 is based, in part, on article 4 of the 1985 draft European Convention, which states; "[w]here underwater cultural property is of particular interest to other contracting States, contracting State should consider providing information about the discovery of such property and collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the property to the extent permitted by their legislation."

heritage, location of heritage, heritage excavated or retrieved contrary to this Convention or otherwise in violation of international law, pertinent methodology and technology, and legal development relating to heritage.

3. All information shared between States Parties, or between UNESCO and State Parties regarding the discovery or location of underwater cultural heritage [may][should]be kept confidential [and][or] reserved to competent authorities of State parties as long as [there is a reasonable likelihood that] the disclosure of such information might endanger or otherwise put at [substantial] risk the preservation of such underwater cultural heritage [or where the information is culturally sensitive].
4. Each State Party shall take all practical measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or retrieved contrary to this Convention or otherwise in violation of international law."[161]

UCH, whether found in international or coastal waters, often has an international character, either in the origins of the vessel, its components, crew, cargo or trading route. As such, it may be of archaeological, historical or cultural interest to a number of nations, thus giving rise to both a potential national interest in UCH as well as an international interest as it reflects the common heritage of humankind. It is therefore incumbent on any State engaged in any activity directed at UCH to endeavour to co-operate with any other State that might have an interest in the cultural heritage. Article 12(1) does not require that States actually co-operate, only that they 'endeavour' to do *so, where* 'practical'. This does, however, raise the expectation that States will co-operate unless there is a valid reason for not doing so, the onus being on the State reluctant to co-operate to justify its non-co-operation.

Article 12(2) requires States to share information concerning UCH. While this duty is mandatory in nature, it is limited to that which is compatible with the purposes of this Convention. Listed are exemplary instances where a State may be duty bound to share this information. While instances concerning contraventions of international law or the Convention itself appear appropriate, the inclusion of the discovery and location of UCH has proved problematic. It was feared that disclosure of information relating to the discovery and location of UCH, particularly of UCH containing economically valuable UCH, may endanger the UCH. Thus article 12(3) was introduced as an attempt to mitigate the duty to share information by introducing an exception to the general duty. The extent of this exception has, however, proved difficult to determine, resulting in a number of alternatives proposed for the article, reflected by the square brackets.

Article 12(2) was also problematic due to uncertainties regarding the geographical scope of the convention, as should the article apply to the territorial waters of a State party, a number of States view this as a potential infringement of their sovereignty and a source of possible conflict.[162] The question of collaboration and the sharing of information regarding UCH found with a State's jurisdiction not only raised issues of the restitution of cultural heritage, but also the determination of which States should be informed of any activities directed at UCH, as well as the role of UNESCO in the sharing of information. At the third meeting of experts, the UK proposed an additional paragraph[163], which required that the discovery of any UCH in "areas under their

[161] While the use of databases is invaluable, developing States may not have the facilities or infrastructure to manage such databases. The Russian Federation has proposed that such databases be maintained by UNESCO, or the ISBA for UCH found in the Area. CLT-99/CONF.204/5, Paris, April 1999

[162] CLT-99/WS/8, Paris, April 1999 p.59

[163] Article XX, entitled, "Sharing of information on discoveries of underwater cultural heritage", stated that; (1) The State Parties shall require, in accordance with their national laws, that all discoveries of objects or sites of underwater cultural heritage in areas under their sovereignty, or in the course of activities under their jurisdiction, are reported to them; (2) In accordance with Article 303 of the Convention, the State Parties shall notify UNESCO of discoveries reported under paragraph 1. Where the object or site is discovered in another State, the State Parties shall also notify that State; (3) The State

sovereignty, or in the course of activities under their jurisdiction, are reported to them" and that the State party would then notify UNESCO of discoveries reported and, when the UCH was discovered in areas under the jurisdiction of another State, to that State. Thus, questions of information sharing and the role of UNESCO have become intricately linked with questions concerning jurisdiction, including the place of the ISBA in the case of UCH found in the Area.

The role of UNESCO in the preservation regime, and in the flow of information concerning UCH, has not been clearly determined. While article 10 required that the Director-General of UNESCO be informed of the seizure of any UCH, article 12 does not specifically require that UNESCO be informed of any activities directed at UCH[164]. UNESCO may also receive information from the ISBA[165] regarding UCH found in the Area.[166] UNESCO, as the holder of a mandate to preserve the world's cultural heritage has an important role of play in this preservation regime, which needs to be fully utilised and clearly identified.

The Role of UNESCO and the ISBA in the Area

Article 7bis of the secretariat draft, requires that any discovery of UCH in the Area shall be reported by the finder to the Secretary-General of the ISBA, which shall transmit the information to the Director-General of UNESCO.[167] Two problems are encountered with this article. Firstly, the article directs responsibility for reporting on the finder, which, as an international convention governing States, is inappropriate. Thus, the Chairman proposed, in option 3 of the negotiating draft, that any find of UCH in the Area be reported by "the State party whose nationals or vessels flying its flag made such discovery to..."[168]. It would be up to States to require their national to report the finds to their competent national authority, who would then be duty bound under article 7bis to report it to UNESCO and/or the ISBA[169]. To which organisation the report should be made has been the second problem encountered.

The UNESCO draft convention will not substantially change the jurisdictional regime established under UNCLOS for the Area, other than to introduce a new function for the

---

Parties shall co-operate with UNESCO to ensure that the information notified under paragraph 2 is circulated to all member States of the United Nations and to all State Parties to the Convention. On receipt of such information, any State may declare an interest in the underwater cultural heritage concerned and its wish to be included in any consultation on how to ensure the effective protection of that underwater cultural heritage. Such a declaration shall not in itself constitute a basis for the assertion of any preferential rights with respect to the underwater cultural heritage concerned; (4) The State Parties shall co-operate to ensure that any State which declares an interest under paragraph 3 is included in such consultations. CLT-2000/CONF.201/3, Paris, April 2000 p.22

[164] See also article 5, option 3 of the negotiating draft, CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.8

[165] The ISBA came into existence upon the entry into force of UNCLOS on 16 November 1994. It consists of an Assembly, a Council and a Secretariat, with the latter being phased in over a period of time with the eventual size numbering 44 staff members.

[166] Article 1(a) of UNCLOS states that for the purposes of the convention the 'Area' means "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."

[167] Article 7bis reads, "[a]ny discovery of underwater cultural heritage in the area, as defined in Article 1, paragraph (1) of the United nations Convention on the Law of the Sea, shall be reported by the finder to the Secretary-General of the International Seabed Authority, which shall transmit the information to the Director-general of the United nations Educational, Scientific and Cultural Organisation." CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.9. Article 7bis originally was article 14 in the secretariat draft. See CLT-96/CONF.202/5 Paris, April 1998. This move was supported by Argentina, Canada, France and the Dominican Republic (1999 meeting).

[168] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.8

[169] See Canadian proposal CLT-2000/CONF.201/3, Paris, April 2000 p.14

ISBA. The introduction of the role of the ISBA in relation to UCH in the Area will be an added function of the Secretariat, one that was not planned for in UNCLOS. Although the relationship between the ISBA and UCH was debated during UNCLOS, it was decided not to impose any duties on the ISBA in this regard. The exact role of the ISBA in this regard is difficult to determine. It would appear that the ISBA would only act as a courier of information. Presumably, it was envisaged that deep seabed mining contractors would be the most likely deep seabed user to come across UCH in the Area, and it would be administratively convenient for them to pass the information to the ISBA rather than to UNESCO directly. However, as it would appear that extensive deep seabed mining will not be viable for some time, it is more likely that deep sea salvage companies would have excavated UCH before the ISBA would ever have received any reports in accordance with article 7bis. Although the ISBA may provide a useful role in the future, it will not be of any assistance in the short term. It has also been argued that the ISBA has no experience and little expertise in dealing with UCH and this function is therefore inappropriate[170]. It may therefore be more advantageous to require all finds to be reported directly to UNESCO[171]. In this way, even finds made by those undertaking activities in the deep seabed not connected to the ISBA will be bound by a duty to report such finds. Although this is a more appropriate solution, it may impose a dual obligation on seabed developers. Under the ISBA Mining regulations, a contractor who discovers any UCH is bound to report the find to the Secretary-General of the ISBA[172]. If the UNESCO draft convention also requires the finder to report the find to UNESCO, the developer will have the dual obligation to report to both organisations.

The role of the ISBA as the primary organisation for the recording of finds of UCH in the Area may also be inappropriate for a more practical reason. As the US has not ratified UNCLOS, it will be denied the opportunity to participate in the institutions established under this convention, such as the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf and the ISBA. The US provisional membership of the ISBA expired on the 16 November 1998[173]. Without membership of the ISBA, it is uncertain whether US explorers of the deep seabed will report any finds in accordance with this article. The US is currently alienated in terms of the mechanisms for determining the rights and duties of States in accordance with UNCLOS, and to introduce further connections with this mechanism in the UNESCO draft may only cause further alienation of the US and its salvage fleet, arguably the world's most advanced national salvage fleet. As the US has stated that it considers the ISBA to have no competence in relation to UCH and should simply take it into account when issuing mining contracts it would appear that the role of the ISBA may be undermined by the US.

---

[170] Observations of Germany and US (1998 meeting), and Australia, Canada and Japan (2000 meeting). See CLT-2000/CONF.201/3, Paris, April 2000 p.13

[171] A number of States have suggested that UNESCO should be the appropriate organisation for the reporting of finds in the Area. This includes India, Germany, Spain, France, Netherlands, Jamaica and South Africa. (1998 meeting), and Japan (CLT-2000/CONF.201/3, Paris, April 2000 p.13)

[172] The ISBA Mining Code is currently under negotiations. The most recent draft of the Code includes the following paragraph; "The Contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of an object of an archaeological or historical nature and its location. Following the finding of any such object of an archaeological or historical nature in the exploration area, the Contractor shall take all reasonable measures to avoid disturbing such objects." Section 6 bis, Annex 4 ISBA/5/C4/Corr1, ISBA/5/C4/ADD1 and ISBA/5/C/4/CORR 1.

[173] The US can, and still does, participate in meetings of the ISBA, as it does in the case of UNESCO, thought it cannot take part in any decision making. A US expert also still sits on the Legal and Technical Committee.

Article 14 requires the finder of the UCH to report the find to the ISBA. It was envisaged that this would ordinarily be a deep seabed mining concern. However, the UNESCO convention is not capable of imposing a duty on individuals, only on State Parties to the convention. As the nationality principle applies in area beyond State territorial jurisdiction, it has been proposed that the State whose nationals or flag vessels made the discovery should bear the onus of reporting the find to the ISBA or UNESCO. In order to reflect this change, the following revised version of article 14 has been proposed:

"[a]ny discovery of underwater cultural heritage in the Area, as defined in Article 1, paragraph 1(1) of the United Nations Convention on the Law of the Sea, shall be reported by *the State Party whose national or vessel flying its flag made such discovery*[174] to the Secretary-General of the International Seabed Authority, who in turn shall transmit such information to the Director-General".[175]

Thus, each State Party will be obliged to establish a reporting system and an obligation on seabed developers who are nationals or whose vessel are registered in that State to report finds to a national authority, who will report to the ISBA, UNESCO or both. This establishment of a national authority will fall within the State duty to establish national services under article 17. This duty has been made even more onerous by the suggestion of some States, most notably Italy[176], that not only should the ISBA or UNESCO be informed of a find, but that the States that enjoy preferential right under article 149 should also be informed of this duty[177]. There would appear to be some general consensus to the removal of the ISBA as the primary information holding organisation for UCH found in the Area, and the appointment of UNESCO to this task. This would have the added advantage of not altering the function of the ISBA in any way, and therefore having minimal effect on UNCLOS[178].

If UNESCO is thus to have a pivotal role in the receiving and co-ordination of information received with regard to UCH in the Area, it would appear logical for UNESCO to act as a clearing house for information of UCH discovered in other maritime zones, including the territorial waters of the coastal State where another State may have an interest in this UCH[179].

Preferential rights of States

The notion of preferential rights has its origins in article 149 of UNCLOS. In order to appreciate the complexities associated with the introduction of this notion, it is necessary to briefly consider the drafting history of this article.

---

[174] Own emphasis. Replaces the word "finder"

[175] The phrase "of the United Nations Educational, Scientific and Cultural Organisation" has been deleted, as Director-General will be defined in article 1 as referring to the Director-General of UNESCO.

[176] Spain have also supported the introduction of this clause. (1998 meeting)

[177] The Italian delegation proposed the addition of the following sentence to the end of article 14; "UNESCO shall inform of the discovery all States that enjoy preferential rights under Article 149 of the United Nations Convention on the Law of the Sea"

[178] The structure of the ISBA had been a controversial point during UNCLOS III, and any attempt to alter the structure at a time when the ISBA is in the process of being established may be counter productive. For more background on the negotiations regarding the ISBA, see Anand, R.P., "UN Convention on the Law of the Sea and the United States" 24(2) *Indian Journal of International Law* (1984) p.164

[179] The role of UNESCO in the preservation regime is considered in more depth in chapter 6.

The topic of the preservation of UCH during UNCLOS III negotiations was first contained in the draft articles of the first committee at its informal meeting in 1974[180]. Greece and Turkey were concerned that UCH of antiquity might be found in international waters, and not being subject to State immunity nor being within their territorial jurisdiction, might not be susceptible to any control of a State from which it might have originated or have close archaeological, historical or cultural links. It was thus proposed that in the determination of the manner of preservation or disposal of UCH found in the area, preferential rights were to be given to, what the initial Greek proposal termed, "State of historical origin". This was later amended by the Greek delegation to read "State of cultural origin". The Turkish representative believed that this definition was to imprecise and proposed the term "State of the country of origin".[181] However, when drafting the Informal Single Negotiating Text in 1975, instead of reaching consensus as to which of the alternatives definitions regarding preferential rights to UCH should be contained in this article, all alternatives were included. The resulting article 149 is thus ambiguous as it is difficult to determine whether these alternatives might refer to the same State or different States.[182] It is difficult to distinguish between 'the State or country or origin', the 'State of cultural origin' or the 'State of historical and archaeological origin'. This difficulty arises in part because these formulas were never intended to be used together. Only one should have been chosen when article 149 was drafted. Moreover, the older an item of UCH is, the more difficult it becomes for archaeologists to determine the exact origin of the UCH.[183] The problem may be further complicated if UCH such as a vessel and its cargo have different States of origin[184]. If a number of States were to compete for the preferential rights, it may be that the dispute resolution regime in UNCLOS would have to be brought into play. Alternatively, the competing States would have to enter into a bi-lateral or multi-lateral treaty to determine the division of preferential rights.[185]

This notion of preferential rights also raises a number of difficulties, particularly as it suggests a nationalistic approach to disposition of UCH, as opposed to a universal approach which benefits humankind as a whole. The notion of preferential rights is not new to the law of the sea, and was extensively discussed by the International Court of Justice in the *Fisheries Jurisdiction Cases (United Kingdom v Iceland & Federal Republic of Germany v. Iceland)* in 1974. However, it is not certain what the preferential rights referred to in article 149 are. It may be the right to decide what is to

---

[180] Article 20 of the draft articles of the first committee read; "(A) 1. Particular regard being paid to the preferential rights of [the State of (sic) country of][the State of cultural][the State of historical and archaeological] origin, all objects of an archaeological and historical nature found in the Area shall be preserved [or disposed of by the Authority] for the benefit of the international community as a whole. [2. The recovery and disposal of wrecks and their contents more than [fifty] years old found in the Area shall be subject to regulation by the authority without prejudice to the rights of the owner thereof.] or (B) Omit this provision." UNCLOS OR art 163, U.N. Doc. A/CONF.621 C.I/L.3 (1974), See Nordquist. M.H., *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. 5 (1989) Martinus Nijhoff Publishers p.1xi

[181] A/AC.138/S.C.1/SR

[182] Newton, C. F., "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention" 10 *Hastings International and Comparative Law Review* (1986) p.183. See also Firth, A.J., *Managing Archaeology Underwater* (1996) Unpublished PhD Thesis University of Southampton pp.157-159

[183] See Strati, A., *The protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary law of the Sea* (1995) Martinus Nijhoff Publishers pp.307-308, and particularly p.322

[184] Migliorino, L., "Submarine Antiquities and the Law of the Sea" 4(4) *Marine Policy Reports* (1982) p.3, See also Watters, D.R., "The Law of the Sea and Underwater Cultural Resources" *48 American Antiquity* (1983) p.812

[185] Such bi-lateral treaty might resemble that entered into between Australia and the Netherlands concerning Old Dutch Shipwrecks. See Prott. L.V. and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO p.75

be done with the UCH, such as determining whether it should be left *in situ* as a memorial or raised; or it may entitle that State to be the main beneficiary of the sale of recovered UCH or money raised from museum exhibits. The recognition of preferential rights implies the recognition of other State's rights and, as this term is so uncertain, a preferential State may not necessarily have the power to prevent any other State from searching for or retrieving UCH. Nor is it clear whether this preferential right includes granting any ownership right to the UCH.[186]

Given the difficulties with determining the meaning of preferential rights, and identifying the State that might be the recipient thereof, it is unfortunate that a number of proposals have reintroduced this terminology into the UNESCO draft convention[187]. For example, article 10(3) requires a seizing State to inform UNESCO of the seizure, as well as "the State of origin, State of cultural origin or State of historical and archaeological origin...".[188] Further complication has been introduced through the reference to the State that may have a "cultural heritage interest" in UCH seized[189], reference to a State which may have "a national heritage interest" in UCH[190], and a proposal by Argentina that a State with a "verifiable link" be allowed to participate in regional agreements.[191]

In the establishment of a regime to preserve the UCH, it is essential that all States are active participants and, given the difficulties of interpretation of article 149 with regard to the determination of the nature of preferential rights[192], it is submitted that all States should be able to collaborate in the preservation of UCH. This would include any possible excavation, as well as receive information, particularly concerning seized UCH, from a central information dissemination unit, most likely, UNESCO[193]. The inclusion of all States in the preservation of UCH is best articulated by the Philippine comments on the negotiating draft, which reads; "[t]he Philippines is not prepared to

---

[186] For example, He Shuzhong, of the National Administration of Cultural heritage of China, regards the commercial exploitation of the Dutch East Indiaman *Geldermalsen*, which was carrying a cargo of Chinese porcelain, as having ignored the preferential rights of the State of origin, China. See Shuzhong, H., What Kind of Underwater Convention Do We Need? " 8(2) *International Journal of Cultural Property* (1999) p.575

[187] Italy, for example, emphasised the special position of States of cultural, historical or archaeological origin should be considered for objects found in the Area and on the continental shelf of another State. CLT-2000/CONF.201/3, Paris, April 2000 p.16. The US proposed the following paragraph, "[u]nderwater cultural heritage found beyond the limits of national jurisdiction shall be preserved or disposed of in accordance with this convention for the benefit of humankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin." CLT-99/WS/8, Paris, April 1999 p.24

[188] CLT-2000/CONF.201/8, Paris, 5 July 2000. See also article 5, option 1; article 7 and article 2ter, option 2; and article 7, option 3 of the negotiating draft, CLT-96/CONF.202/5 Rev.2, Paris, July 1999 and support for some of these inclusion in CLT-2000/CONF.201/3, Paris, April 2000 pp.10 and 11

[189] CLT-96/CONF.202/5 Rev.2, Paris, July 1999, article 11

[190] CLT-96/CONF.202/5 Rev.2, Paris, July 1999, article 13

[191] CLT-2000/CONF.201/9, Paris, 7 July 2000, WG1/WP.20, Paris, 5 July 2000

[192] See CLT-99/WS/8, Paris, April 1999 p.58

[193] The expansion of States participation in regional agreement, and in respect of receiving information concerning seized UCH is evident in the Spanish proposal, which was to replace reference to "any State Party which is know to have a cultural heritage interest therein" with the phrase "any other State Party interested." CLT-2000/CONF.201/3, Paris, April 2000 p.15. (see also CLT-99/CONF.204/5, Paris, April 1999). However, though wishing to obtain information from States that have seized UCH, irrespective of whether the UCH has any connection with the State, Spain did wish to confer preferential rights to the State of cultural, historical or archaeological origin when a determination had to be made regarding the disposition of the seized UCH. CLT-2000/CONF.201/3, Paris, April 2000 p.16. It is clear that Spain fears not being informed of the seizure of UCH in cases where the seizing State may not regard Spain as having a cultural heritage interest in the UCH.

concede a predominant role of control or regulation to "states of cultural, historical and archaeological origin" of a given underwater cultural heritage, precisely because, and this being the *raison d'être* of the proposed Convention – the said heritage have already become, for all intents and purposes, the common heritage of humanity. Accordingly, they would require for their protection and preservation, the same level of co-operation and participation for the common benefit of all state parties."[194]

Regional agreements

The preservation of the cultural heritage has been the subject of a number of regional agreements.[195] As it would appear that obtaining consensus may substantially weaken the provisions of the preservation regime, a number of States, most notable European and Latin American/Caribbean States[196], were concerned that the introduction of these minimum standards would be insufficient to preserve the UCH in certain regions. It was therefore proposed that the convention should encourage the development of regional or bi-lateral agreements[197]. This development would accord with the duties of States to co-operate for the purpose of preserving UCH in the maritime zones to which article 303(1) of UNCLOS applies[198]. Thus article 2 *ter* was proposed in the negotiating draft which provides that;

---

[194] The Philippine opening statement at the third meeting delivered by H.E.Hector K. Villarroel, 3 July 2000. See the Hungarian proposal to remove reference to "States of cultural origin and States of historical and archaeological origin" in article 5, option 1. CLT-2000/CONF.201/3add, Paris, June 2000 p.5)

[195] These are considered in Appendix VII

[196] The slow pace of negotiations, and the call for a further meeting of experts prompted the Latin American group, led by the delegation from the Dominican Republic, to state that, if the process was not speeded up, they would consider establishing a regional agreement on the basis of the Declaration of Santo Domingo, which purports to implement many of the provision of the UNESCO draft. The Declaration of Santo Domingo (Appendix X) was endorsed by the X Forum of Minister of Culture and Offices Responsible for Cultural policies of Latin American and the Caribbean, December 4-5, 1998

[197] Examples of bilateral agreements include the agreement entered into between the US and Mexico (Treaty of Co-operation Providing for the recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States-Mexico, 22 U.S.T. 494, T.I.A.S no. 7088); between the US and Peru (Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, September, 15 1981, United States-Peru, T.I.A.S No. 10136) and between US and Canada (Anon., "Agreement Between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material" 8 *International Journal of Cultural Property* (1999) pp.245-257). See Nafziger, *op.cit* pp.341-342. The use of bi-lateral or regional agreements may be of particular importance in the preservation of an identified wreck of archaeological or historical significance. For example, the US have attempted to conclude a multi-lateral agreement to protect the wreck of the *R.M.S. Titanic*. Although no regional agreement exists in this respect, an agreement that may be analogous to this type may be the agreement concluded by Scandinavian Countries to protect the site of the wreck of the Estonia. See *Agreement Regarding the M/S Estonia* reprinted in 20(4) *Marine Policy* (1996) pp.355-356 (For a discussion on wrecks as a memorial, see Allen, B. L., *Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the UN Law of the Sea Convention 1982* (1991) Special Publication of the Institute of Maritime Law, University of Cape Town Publication no. 14. 1991 p.40–41). An important bilateral agreement which concerns UCH, its that entered into between the Governments of Netherlands and Australia concerning VOC wrecks lost off the coast of Western Australia. See "Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks 1972", as reproduced in Prott and Srong *op.cit* p.75

[198] It was noted that regional agreements on the preservation of UCH might be structured on the same basis at that applying to regional agreements in relation to marine scientific research provided for in article 123 of UNCLOS. Article 123 reads as follows; "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organisation:(a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to co-ordinate the implementation of their rights and duties with respect to

"State may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]"[199]

The establishment of international agreements, whether bilateral or multilateral, global or regional, are a natural aspect of international law and reflected by the negotiations of this very convention. As such this proposal does not provide States with any rights or duties they do not already possess as subjects in international law. Nevertheless, promotion of regional agreements may enable certain objectives of the convention to be realised, such as assistance in education and training. [200]

While this article promotes the establishment of regional agreements, a number of States were concerned that such agreements would be limited to regional States only, thus excluding States which might have an archaeological, historical or cultural link with the UCH[201]. Should these regional agreements be so restricted, it will have the effect of undermining the principle of co-operation so essential to the structuring of an effective preservation regime. While a proposal was made to include "States of cultural origin and States of historical and archaeological origin" in possible regional agreement[202], it is submitted that all States should be able to enter into regional agreement, should this article receive support[203]. This would reflect the basic principles of international law, as no convention can validly limit the manner in which future convention are negotiated and the State parties thereto.

The regime proposed in article 2 *ter* is unfortunate in that it suggests that the preservation regime that might result from this process may not function as effectively as many States might wish. It proposes the fragmentation of the regime applying to UCH, so that the degree of preservation of the UCH will be a function of its geographical position. Such a fragmented legal regime is quite contrary to the very aim of this convention. Yet, in the process of international negotiation, it may be a compromise necessary to promote the preservation of UCH in some areas, while promoting the 'idea' of preservation in others. As Carmen notes, the legal protection of one category of cultural heritage, or in this case of UCH in one area, elevates by

---

the protection and preservation of the marine environment; (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area; (d) to invite, as appropriate, other interested States or international organisations to co-operate with them in furtherance of the provisions of this article". CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.35

[199] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.7

[200] Article 270 of UNCLOS, promotes the utilisation of regional agreements in the transfer of technology for marine scientific research. This may be analogous to the transfer of technology in relation to underwater archaeology. Article 270 states; "International co-operation for the development and transfer of marine technology shall be carried out, where feasible and appropriate, through existing bilateral, regional or multilateral programmes, and also through expanded and new programmes in order to facilitate marine scientific research, the transfer of marine technology, particularly in new fields, and appropriate international funding for ocean research and development".

[201] The Italian, Belgium and French delegations, for example, while welcoming the inclusion of a paragraph on regional agreements, stressed that such agreements should include more than only the coastal States of a region, and might include other States, such as the States or origin. It was therefore suggested that the paragraph should not use the term 'regional', as it contained geographical connotations. (2000 meeting)

[202] See Korean proposal, CLT-2000/CONF.201/9, Paris, 7 July 2000, WG1/WP.21, Paris, 5 July 2000, and the Japanese proposal CLT-2000/CONF.201/9, Paris, 7 July 2000, WG1/WP.24, Paris, 5 July 2000

[203] While Spain, Italy, Japan, UK, Poland and Korea, supported the inclusion of an article on regional agreements, Argentina and Tunisia opposed it. (2000 meeting)

association all other cultural heritage, or UCH in other areas, in the public perception[204]. It may therefore simply be the beginning of a process of expanding preservation to all areas.

Dispute settlement provisions

Whilst the draft convention attempts to establish a preservation regime based on State co-operation, the establishment of such a regime inevitably poses the possibility of disputes concerning the interpretation or application of its provisions. Should the convention retain reference to preferential rights of States of cultural, historical or archaeological origin, it is highly likely that disputes may arise. As such, the draft convention provides for a dispute settlement mechanism. Article 19 states that;

"[a]ny dispute between two or more State Parties concerning the interpretation or application of the present Convention or the Rules of the Annex and not settled by negotiation shall, at the request of any of the parties to the dispute, be submitted to arbitration. If the State parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice."[205]

The establishment of such a dispute settlement regime has been subject to some negotiation. In particular, it has been proposed that the dispute settlement system provided for in UNCLOS should apply to this convention[206]. These proposals are in part associated with attempts to align this convention with UNCLOS as an implementation agreement. Should this convention be adopted by UNESCO as an independent convention, it is submitted that the complicated UNCLOS regime would be unnecessary. Suggestion have been made to substitute the International Tribunal for the Law of the Sea with the International Court of Justice, given the formers expertise in the Law of the Sea, though this tribunal will not have any experience in cultural heritage matters.

Conclusion

The proposed preservation regime, though showing signs of promise, suffers from one important debilitating provision. It relies, as the primary preservation mechanism, on the removal of any commercial incentive to recover UCH. The rationale is that the dangers posed to UCH originate in the realisation of the economic value of UCH. While this has proved, on balance, to be true, the declaration that UCH will not be subject to commercial interests does not eliminate the economic value attributable to UCH. Those who attribute such a value to UCH, will continue to do so. Given the fact that the oceans are notoriously difficult to police, and that the economic incentives in realising the economic value of UCH may be attractive to developing States, it is extremely unlikely that this mechanism will be effective. As the cost of technology allowing the recovery of UCH in deeper water continues to fall, so the ease at which the UCH can be recovered increases and the difficulty to enforcing this provision increases.

---

[204] Carman, R.J., *Valuing Ancient Things: Archaeology and Law in England* (1993) Unpublished PhD Thesis, University of Cambridge p.249

[205] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.12

[206] France, Sweden, Norway and the UK proposed the inclusion of a dispute settlement provision set out in Part XV of UNCLOS, (CLT-2000/CONF.201/3, Paris, April 2000 p.17) as did the Russian Federation (CLT-99/CONF.204/5, Paris, April 1999).

The preservation regime does, however, include promising provisions, including the use of permits and the control of the importation of UCH. The most promising preservation mechanism is that of effective international co-operation. For many States, international co-operation and collaboration in archaeological projects poses the only possibilities for the preservation of UCH in some State's territorial waters or in international waters within easy access from that State.[207] This is particularly the case for developing States that lack the expertise, infrastructure or finances necessary to adequately preserve the UCH. For these reasons, Columbia proposed inclusion of a new paragraph, reading;

"[t]he States Parties, directly or through International Organisation, and in the spirit of co-operation inspired by this Convention, will stimulate shared investigation, transmission of technology and adequate international financing directed at the protection and conservation of underwater cultural heritage."[208]

There is a sense that the UCH will only be adequately preserved if a co-ordinated preservation regime is introduced, thus calling into question the possible role of a centralised international authority.

Effective international co-operation can provide the necessary requirements for the determination of an effective preservation regime and delineate responsibility between States and possibly an international organisation, such as UNESCO. The extent of the delineation, however, is a matter of controversy amongst States, particularly as rights and duties ancillary to the preservation of UCH have already been determined in previous international agreements. This requires the co-ordination and consistency of rights and duties between States as contained in these international agreements and the UNESCO draft convention. This shall be considered in chapter 4.

207 CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.43
208 CLT-2000/CONF.201/9, Paris, 7 July 2000, WG1/WP.2, Paris, 5 July 2000

Chapter 4

Jurisdiction and the Distribution of Responsibility to Preserve Underwater Cultural Heritage

Introduction

As was indicated in chapter 3, international co-operation is essential for the development of an effective preservation regime. This co-operation requires the delineation of responsibilities between States and possibly international organisations such as UNESCO. As Oxman states, "the law of the sea is important ...because it supplies the jurisdictional framework pursuant to which states may, individually and co-operatively, develop a substantive law of marine archaeology."[1] This requires consideration of State's jurisdictional competencies, and therefore addresses certain jurisdictional questions which have hitherto been determined in the context of the law of the sea. The importance and difficulty in negotiating UNCLOS requires some consideration in order to explain the importance that States attribute to the necessity of ensuring that any new convention on the preservation of UCH is consistent with this international regime.

It is unfortunate that negotiations concerning this draft convention have been embroiled with negotiations on the jurisdictional competencies of States in international waters rather than on the structuring of a preservation regime for UCH in these waters. Consideration of jurisdiction is, however, important in determining the framework for the preservation regime, and therefore will be considered in detail in this chapter.

An introduction to the law of the sea

The law of the sea is one of the oldest branches of international law.[2] The first attempt at codification of the law of the sea was the First United Nations Conference on the Law of the Sea, held in Geneva in 1958.[3] As successful as this Conference was, it failed to reach agreement on the extent of the territorial zone or the extent of coastal State fishing jurisdiction. In 1960, the Second United Nations Conference on the Law of the Sea was held in an attempt to reach agreement on these outstanding issues. Unfortunately, no agreement was reached.[4] Advances in technology during the 1960's highlighted the ability of certain maritime nations to undertake mineral extraction from the deep seabed and for long-distance fishing fleets to cover increasingly vast ocean areas with new

---

[1] Oxman, B. H., "Marine Archaeology and the International Law of the Sea" 12(3) *Columbia VLA Journal of Law and the Arts* (1988) p.355

[2] Nordquist, M.H., *United Nations Convention on the Law of the Sea: A Commentary* Vol.1 (1985) Martinus Nijhoff p.xxv. For further reading on the Law of the Sea, See Knight, G. and Chiu, H., *The International law of the Sea: Cases, documents and readings* (1991) Elsevier Scientific Publications

[3] From this conference, four international Conventions were produced; the Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S 205 (1958); the Convention on the Continental Shelf, 499 U.N.T.S 311 (1958); the Convention on the High Seas, 450 U.N.T.S 11 (1958) and the Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S 286 (1958). See Brownlie, J., *Basic Documents in International Law* 4th ed. Oxford University Press (1995) pp.77–115.

[4] UNCLOS II failed by one vote to obtain the required two-thirds majority needed to settle the breadth of the territorial sea at 6 nm. See Nordquist *op.cit* p.xxv

technologically advanced fishing methods[5]. These, together with the unresolved issues of the Second United Nations Conference created the political environment conducive to reopening negotiations on the law of the sea. In 1967, an *ad hoc* Committee was established to study the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction.[6] This committee was to be the forerunner and preparatory body for UNCLOS III, which was convened after five years of negotiations. The final session of UNCLOS III took place in December 1982 in Montego Bay, Jamaica, at which UNCLOS was signed by 117 States and entered into force in November 1994.[7]

Part XI of UNCLOS, of which article 149 forms part, was one of the most difficult sections to reach agreement on. In 1982, the US and other industrialised nations objected to Part XI and lead to the US[8] voting against the convention, together with Israel, Turkey and Venezuela, and 17 abstentions, including the UK. The controversy over deep seabed mining and the ISBA was resolved in 1994 when the "Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982" was opened for signature.[9] However, this agreement makes no mention of the ISBA's powers in relation to UCH.

Certain States, such as the US have, as yet, not acceded to UNCLOS[10]. These States will therefore not be bound by the provisions of the Convention, and, as the Convention was negotiated and accepted as a package deal, non-signatory States cannot attempt to take advantage of those provisions which they would like to accept and reject those which they considered an undue burden. Those States which have not acceded to UNCLOS, but who are party to the 1958 Conventions, will then be bound by the terms of the later convention. It will therefore be important to consider the protection and management of UCH under both the 1958 Conventions and UNCLOS.

UNCLOS was not only a codification of the international law of the sea, but included elements of progressive development, such as the creation of the EEZ and entitlements of archipelagic States.[11] Those provisions of UNCLOS which are regarded as having been codified, will therefore be considered as customary international law, and binding on all States irrespective of whether they have having acceded to either the 1958 Conventions or UNCLOS. As the 1958 Convention has no provisions regarding the preservation and management of UCH, article 149 and 303 of UNCLOS can safely be regarded as examples of progressive development. Whether any parallel customary international law have developed will depend on State practise.

---

[5] See Anon., *Marine Scientific Research: A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* Published by the Office for Ocean Affairs and the Law of the Sea p.vii

[6] Hereafter "Seabed committee".

[7] Article 308 of the Convention holds that the Convention will come into force twelve months after the sixtieth ratification, which was that of Guyana in November 1993.

[8] The US rejection was based on its opposition to Part XI concerning the deep seabed mining regime, and stated that its behaviour and positions in other respects would be guided by the convention. Oxman *op.cit* p.356

[9] A total of 51 States had signed as at September 1994, including the US

[10] For an overview of the US position with regards to UNCLOS, see Morell, J.B., *The Law of the Sea: An Historical Ananlysis of the 1982 Treaty and Its Rejection by the United States* (1992) McFarland & Company, Inc and Galdorisi, G., "US and the law of the sea: A window of opportunity for maritime leadership" 26(1) *Ocean development and International Law* (1995) pp.75-83

[11] Blake, J.E *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts* (1996) Unpublished PhD Thesis, University of Dundee p.62

The negotiating procedure of UNCLOS III

The negotiating procedure[12] of UNCLOS III was unique in two respects: firstly, unlike the first conference in 1958, the third conference did not have before it a basic text upon which to begin negotiations; and secondly, it was agreed that the negotiating procedure would be based on consensus[13]. This meant that the conference was committed on reaching agreement on all substantive issues without having to have recourse to voting. The conference negotiating procedure revolved around five substantive committees; each committee dealing with different aspects of the law of the sea. This resulted at times in conflicting draft articles when a particular point was common to two or more of the committees.[14]

Committed to reaching agreement by way of consensus, the convention was faced with a daunting task given the number of negotiating States[15] and the number of issues to be dealt with[16]. This was further exacerbated by the fact that the resulting convention would be a package deal[17]. As the convention would be achieved by way of consensus, it was agreed that no State could enter any reservations on any of the clauses of the

---

[12] The negotiating procedure of UNCLOS III has been extensively discussed elsewhere. See for example Anand, R.P., "UN Convention on the Law of the Sea and the United States" 24(2) *Indian Journal of International Law* (1984) pp.153-199; Plant, G., "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" 36 *International and Comparative Law Quarterly* (1987) pp.525-558; Butler, W.E., " Custom, Treaty, State Practise and the 1982 Convention" 12 *Marine Policy* (1988) pp.182-186; Buzan, B., "Negotiating by consensus: Developments in Techniques at the UN Law of the Sea Conference" 75 *American Journal of International law* (1981) pp.324-348; Gamble, J.K. and Frankowska, M., "The 1982 Convention and Customary Law of the Sea: Observations, a Framework and a Warning" *21 San Diego Law Review* (1984) pp. 491-511; Hardy, M., "Decision making at the law of the Sea Conference" 11*Revue Belge de Droit International* (1975) pp.442-474; Larson, D.L., "Conventional, Customary and Consensual Law in the United Nations Convention on the Law of the Sea " *25 Ocean Development and International Law* (1994) pp.75-85; Macrae, L.M., "Customary International Law and the United Nations Law of the Sea Treaty" 13 *California Western International Law Journal* (1983) pp.181-222; Shibata, A., "International Law Making Process in the United Nations: A Comparative Analysis of UNCED and UNCLOS III" 24(1) *California Western International Law Journal* (1993) pp.17-53; Treves, T., "Devices to Facilitate Consensus: The Experience of the Law of the Sea Conference" 2 *Italian Yearbook of International Law* (1976) pp.39-60; Van Dyke, J.M., *Consensus and Confrontation: The United States and the Law of the Sea Convention* 1984 The law of the Sea Institute, University of Hawaii; Vignes, D., "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?" 69 *American Journal of International Law* (1975) pp.119-129

[13] Initially, the agreement to use consensus rather than formal voting to reach agreement was on a quasi-formal basis, the subject of a 'gentleman's agreement' rather than an explicit formal procedure. See Plant *op.cit* p.527; Hardy *op.cit* pp.454-456

[14] This is apparent in the drafting history of articles 149 and 303. Article 149, was drafted by the first committee dealing with the deep seabed and the ocean floor, while article 303 was drafted by the second committee dealing with the general law of the Sea.

[15] A total of 164 States registered at the conference, while at least 140 States were present at most of the negotiating sessions. Many of these States were newly independent developing States, eager to assert their newly found sovereignty. The problems associated with such a large number of States was exacerbated by the development of new alliances and interests groups within the conference. See Nordquist *op.cit* p.39, pp.54-55 and pp.68-86

[16] In 1972, the Seabed committee drafted a list of subjects and issues that would form the basis of the Conference agenda. It included a vast variety of issues, such as the breadth of the territorial sea, State claims to mineral resources of the seabed, the claims for two new maritime zones (the EEZ and archipelagos) marine scientific research, the management of highly migratory fish species and the prevention of marine pollution. Out of 25 items, archaeological objects found on the deep seabed were listed 23rd. Nordquist *op.cit* p.36

[17] For further detail on the nature of the Package deal, see Caminos, H and Molitor, R., "Progressive Development of International Law and the Package Deal" 79 *American Journal of International Law* (1985) pp.871-890

convention. Implicit in the package deal concept was the assumption that the minimum interest of a maximum number of States on substantial issues would be met. This would necessitate trade-offs and reciprocal support between various claims[18]. In order to achieve this, much of the negotiations were conducted in informal and unofficial private meetings for which no official records were kept[19]. This, Blake states, makes it "difficult to differentiate process from substance when seeking to understand the very mixed success of UNCLOS III."[20]

Given the large number of items to be negotiated, their complexity and the strategic importance of many of these items, it is not surprising that concerns regarding UCH were not high on many States' agenda, and received little serious negotiations. The package deal concept and consensus drafting resulted in the preservation and management of UCH being considered only to the extent that it would be compatible with the overall scheme of UNCLOS. When UNCLOS was opened for signature, of the 320 articles, only two dealt with UCH, namely articles 149 and article 303. These, articles, as was established in chapter 2, do not provide an adequate regime for the preservation of UCH.

Underwater archaeology as marine scientific research

Part XIII of the convention sets out the regime for marine scientific research[21]. Underwater archaeology is certainly a scientific discipline and dependent on scientific research. Although this research may take place in the marine environment, in the ordinary meaning, it will not constitute MSR, which should be limited to the study of the marine environment and its natural resources.[22] Whether underwater archaeology falls within the meaning of MSR in terms of UNCLOS is, however, unclear as the term 'marine scientific research' is not defined in the convention[23]. However, article 243 requires States to enter into agreements to create favourable conditions for scientists "studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them." This certainly suggests that the subject matter of MSR is the marine environment itself.[24] The *travaux préparatoires* would also indicate that underwater archaeology does not fall within the scope of MSR[25]. At the same time, as the general regime of MSR was concluded before article 303 was drafted, it can be concluded that underwater archaeology was not included in the MSR regime. If it had

---

[18] Plant *op.cit* p.528

[19] This makes it difficult at times to ascertain what trade-offs were made between various States and interest groups. It also makes it difficult to determine individual state commitment to certain of the proposals. See Nordquist *op.cit* pp.86 - 99 and pp. 104 - 112

[20] Blake *op.cit* p.120; See also Hardy *op.cit* p.442. Nevertheless, what *travaux préparatoires* is available is used as a supplementary means of interpreting the treaty when the meaning of a terms of the treaty are ambiguous or obscure, as provided for in article 32 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331

[21] Hereafter "MSR"

[22] Soons, A.H.A., *Marine Sceintific Research and the Law of the Sea* (1992) Kluwer Publishers p.326

[23] Zhao argues that underwater archaeology is a form of MSR under UNCLOS, while other commentators, such as Oxman and Strati argue that it is not. See Zhao. H., " Recent Developments in the Legal Protection of Historic Shipwrecks in China" 23 *Ocean Development and International Law* (1992) p.317; Oxman *op.cit* p.366 and Strati *op.cit* p.42.

[24] Oxman *op.cit* p.367

[25] In particular, Strati points to a number of draft proposals submitted to the conference during the negotiations of UNCLOS which indicate that MSR was to be confined to the marine environment and its natural resources. See Strati, A., *The protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary law of the Sea* (1995) Martinus Nijhoff Publishers p.57, note 52.

been, there would have been no reason to include article 303 in the convention as the regime for the preservation for UCH would have been included in the MSR regime.[26]

Although it can be concluded that in terms of UNCLOS, underwater archaeology is not a form of MSR[27], the underlying principles and many of the provisions relating to MSR in Part XIII are appropriate to the preservation and management of UCH in a number of maritime zones and could form a useful basis for an international preservation regime.

Jurisdiction and the preservation of underwater cultural heritage

Introduction

Whilst articles 149 and 303 are of little practical importance for the preservation of UCH in the various maritime zones, UNCLOS is important in that it determines the jurisdictional structure of the oceans within which a preservation regime can be constructed. The jurisdictional competence of States to preserve UCH is governed by either the provisions of the 1958 Conventions or UNCLOS. These provisions have been considered by UNESCO and the draft convention includes provisions which determine the jurisdictional competence of States. This section will therefore examine the existing jurisdictional structure in each maritime zone[28] and consider the UNESCO proposals to create a new jurisdictional structure for the preservation of UCH.

When, in 1996, the Executive Board of UNESCO produced the 'Feasibility Study for the Drafting of a New Instrument for the Protection of Underwater Cultural Heritage'[29] it became apparent immediately that the jurisdictional regime on which the ILA draft, and possible UNESCO draft, was based was a matter of controversy and needed further investigation.[30]

Jurisdictional framework under the ILA draft convention

The primary aim of the draft convention is to provide some measure of preservation for UCH found beyond States' territorial jurisdiction. The ILA's first project was therefore an investigation of the jurisdictional issue of preservation beyond a State's territorial sea. The question of jurisdiction in relation to UCH had been a matter of controversy at UNCLOS III, had stalled the 1985 European draft convention and had restricted the 1992 European Convention to areas over which States had already declared jurisdiction[31]. The committee wished to avoid similar jurisdictional problems and, in its report to the ILA General Conference in 1990, it stated that "a responsible regime of control must apply, at a minimum, accepted general principles of international

---

[26] Strati *op.cit* p.43; Oxman *op.cit* p.367 and see also ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) p.9

[27] This conclusion is supported by a number of commentators, including Dromgoole *op.cit* p. 4-35; Caflish *op.cit* p.23, Oxman *op.cit* p.367

[28] When applying the provisions of UNCLOS, the arguments of Strati, Caflish and Dromgoole that article 303(1), (3) and (4) applies to all the maritime zones, has been accepted and applied. For a general overview see Lindbloom, S.A., "Historic Wreck Legislation: Rescuing the Titanic from the Law of the Sea" 13 *Journal of Legislation* (1986) pp.92-111

[29] Doc. 146EX/27, Paris, 23 March 1995

[30] Doc. 29C/22, Paris, 5 August 1997

[31] For a more detailed discussion of this convention, see Appendix VII

jurisdiction."[32] The committee considered the Harvard Research project findings as a starting point for defining common principles of jurisdiction and settled on the territorial principle[33] and nationality principle[34] as a basis for the draft convention.

The territorial principle of jurisdiction is of primary importance[35]. The problem for the committee was how to extend the territorial jurisdiction of a coastal State without raising the problem encountered in UNCLOS III and the Council of Europe. Although many States had unilaterally extended their preservation legislation over maritime areas other than the territorial sea[36], the committee wished to give States an explicit international law right to these extensions of jurisdiction. The use of a legal fiction in UNCLOS and the 1985 European draft convention were considered to be "ineffective and insufficient for the protection of underwater cultural heritage".[37] The committee decided not to impose a mandatory extension of coastal State jurisdiction, but rather to allow a State to establish a cultural heritage zone[38] which could consist of "all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with the relevant rules and principles of international law."[39] The existence of the Cultural Heritage Zone would, however, not cover UCH situated in the Area as no State could extend its jurisdiction over this area, necessitating the use of jurisdiction based on nationality[40]. This allows States to extend their preservation

---

[32] O'Keefe, P. & Nafziger, J. A. R., "The Draft Convention on the Protection of Underwater Cultural Heritage" 25(4) *Ocean Development and International Law* (1994) p.400

[33] Determining jurisdiction by reference to the place where the offence is committed.

[34] Determining jurisdiction by reference to the nationality of the person committing the offence.

[35] Territoriality is, not surprisingly, the basis upon which most of the preservation measures pertaining to cultural heritage are based. This is so for the 1970 UNESCO Convention and the World Heritage Convention. Thus the legislation will only protect the cultural heritage situated in that territory and offences relating to that cultural heritage will be enforced by the territorial State. The 1954 Hague Convention however, contains a combination of jurisdictional bases. This convention has as its primary aim the protection of cultural in the event of armed conflict, irrespective of where the cultural property was situated. It was therefore insufficient to base jurisdiction simply on the territorial principle as this would allow an invading State to possibly destroy the cultural heritage of a State which was not a party to the convention. Article 4 therefore requires a State Party to undertake to respect the cultural heritage situated outside its territory. Thus, jurisdiction is based on both the nationality principle and the territorial principle. The territorial State is required to take all necessary measures to establish its jurisdiction over offences when such an offence is committed in the territory of that State (article 16(1)(a), Second Protocol 1999) or, in relation to certain offences (article 115(1)(a)-(c), Second Protocol 1999), when the offender is in the territory of the State. Alternatively, the State is also required to establish its jurisdiction over its own nationals for offences under the Convention and Protocols (Article 16(1)(b), Second Protocol 1999). Similarly, the 1985 European Convention on Offences relating to Cultural Property, impose both territorial and nationality jurisdiction on State Parties. Thus a State Party is required to establish national legislation which extends not only over its territory, but also over its vessels flying its flag, nationals and permanent residents (Article 13). Territorial jurisdiction has therefore been the normal manner in which jurisdiction for the protection of cultural heritage is determined.

[36] These include Australia, Belgium, China, Cyprus, Denmark, France, Morocco, Netherlands, Norway, Seychelles Ireland, Spain, Portugal and Jamaica. Doc. 28C/39, Paris, 31 October 1995 p.4. See also O'Keefe, P.J., "Protection of the Underwater Cultural Heritage: developments at UNESCO" *25 The International Journal of Nautical Archaeology* (1996) p.171

[37] ILA Sixty-Sixth Conference, *Report of the International Committee on Cultural Heritage Law*, Buenos Aires, Argentina (1994) p.9

[38] Article 5 of the ILA draft states; "(1) A State Party to this Convention may establish a cultural heritage zone and notify other States Parties of its actions. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage; (2) A State Party shall take measures to ensure that activities within its zone affecting the underwater cultural heritage complies at a minimum with the provisions of the Charter."

[39] Article 1(3) of the ILA draft.

[40] Article 8 of the ILA draft stated; "[e]ach contracting party shall undertake to prohibit its nationals and ships of its flag from activities affecting underwater cultural heritage in respect of any area which is not within the cultural heritage zone or territorial sea of another state party. The prohibition shall not apply to

legislation to cover activities of its nationals and flag vessels on sites that lie outside of its territorial jurisdiction.[41]

Questions of jurisdiction have been extremely controversial and the overriding concern amongst States is the extent to which jurisdiction would be compatible with that created under UNCLOS[42]. The basic use of territorial and nationality principles of jurisdiction, as contained in the ILA draft, have been retained in the UNESCO draft. The basic framework is that the territorial principle will apply in areas where the coastal State has recognised territorial jurisdiction, namely internal waters, archipelagic waters and the territorial sea, while the nationality principle will apply in those areas beyond the States territorial jurisdiction, most importantly, on the high seas. However, it has also been proposed that the coastal State's jurisdiction over UCH also be extended over the CS and EEZ.

Territorial jurisdiction

The UNESCO draft convention relies on the principle of territorial jurisdiction in the maritime zones under the exclusive sovereignty of the coastal State. This applies in the internal waters, archipelagic waters and the territorial sea of the coastal State. [43]

---

activities affecting the underwater cultural heritage that comply with this Charter." The possibility of using a combination of port State jurisdiction, nationality jurisdiction and territorial jurisdiction was raised by Oxman in 1988. See Oxman *op.cit* p.357

[41] This jurisdiction has already been used in the Protection of Military Remains Act 1986 whereby the UK government protects the sites of aircraft or vessels which were lost during military service and which lie in international waters. It is an offence for a British national to interfere with such a protected vessel without a license. This nationality jurisdiction is unique to this convention, and an improvement on the territorial jurisdiction of the 1992 European Convention and the proposed jurisdiction of the 1985 European draft convention. It would, for example, allow the UK to prevent British nationals from interfering with sites that lie just outside the territorial waters, but within easy reach of the coast. See further Dromgoole, S., "Military Remains On and Around the Coast of the United Kingdom" II(1) *International Journal of Marine and Coastal Law* (1996) pp.23-45

[42] Having considered the ILA draft in 1995, Germany had commented that consideration should be made to "whether the objectives of the UNESCO draft could be achieved by complementing the existing provisions of the Convention: for example, by describing in greater detail the sovereign rights in the 'exclusive economic zone' which, much like the cultural heritage zone, covers the geographical area between the territorial sea and outer limit of the continental shelf, rather than by creating a new maritime zone." (Doc. 28C/39, Paris 31 October 1995 Annex. p.1.) This sentiment prevailed and at the 1996 meeting; the Chairman, summing up the discussion on the ILA's proposal for the establishment of a cultural heritage zone, stated that it would be realistic for a future convention to avoid referring to any new zone under coastal state jurisdiction and to "speak rather of the rights and duties of States beyond the territorial waters and of jurisdiction implying potential control but not control itself."(CLT-96/CONF.605/6, Paris, May 1996 p.10).

[43] The regime applicable to straits and archipelagic waters in similar to that pertaining to the territorial waters, and is therefore only covered here in brief. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provided for innocent passage through straits consisting of riparian State's territorial seas. This innocent passage was the same as that applied to the territorial sea of the coastal State except that the innocent passage through the strait was non-suspendable. Archaeological surveys or excavation in straits would therefore not fall within the definition of innocent passage, and control of such activities would fall exclusively within the jurisdiction of the coastal State. UNCLOS provides for transit passage that operates in a similar fashion to innocent passage, in that it must be continuos and expeditions (Article 38(2)). Ships engaged in transit passage have a duty to "proceed without delay through or over the strait" (article 3(91)(a)) and "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless necessary by *force majeure* or distress" (article 39(1)(c)). Article 40 specifically states that "during transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorisation of the States bordering the Strait". It is therefore quite clear that

Internal waters, archipelagic waters and the territorial sea

Article 4 of the negotiating draft[44] is headed "Underwater Cultural Heritage in Internal Waters, Archipelagic Waters and Territorial Sea" and states that;

"1. State Parties, in the exercise of their sovereignty, have the exclusive right [in accordance with Article 2][without prejudice to Article 2] to regulate and authorise activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, State Parties [should take all necessary measures to ensure][shall require] that, at a minimum, the Rules in the Annex be applied to [activities directed at] underwater cultural heritage in their internal waters, archipelagic waters and territorial sea."

The official commentary to the first UNESCO draft convention states that "the primary objective of the draft convention is the protection of UCH in areas outside the internal waters, archipelagic waters and territorial sea of State Parties."[45] This then is the primary objective, though not the sole objective of the draft. To this extent, it has been proposed that the convention should, in some form, require State Parties to ensure that UCH in the internal waters, archipelagic waters and territorial seas are preserved to the same minimum standards as UCH found in international waters. This, however, has led to uncertainties regarding the extent to which this convention may impinge upon the sovereignty of the coastal State in these maritime zones. Before considering this question, the legal provisions of the 1958 Convention and UNCLOS will be reviewed in order to describe the existing legal structure with regard to UCH in these maritime zones.

The Geneva Convention on the Territorial Sea and the Contiguous Zone [46]

The recognition of the territorial sea as part of the territory of the coastal State was broadly accepted at the time of the Conference for the Progressive Codification of

---

any activity such as working along survey grids or undertaking excavations would not amount to transit passage, and would fall within the control jurisdiction of the coastal State. (For a detailed discussion on the law applicable to Straits, see Nandan. S.N and Anderson, D.H., "Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea" *British Yearbook of International Law* (1982) p.159). UNCLOS recognised, for the first time, the claims of archipelagic States (articles 46-54). The archipelagic waters recognised by the convention are *sui generis* falling under the sovereignty of the Archipelagic State. This includes the airspace above archipelagic waters and the seabed and subsoil, and the resources contained therein (article 49(2)). Flag vessels have the rights of innocent passage and archipelagic sea-lane passage. In a similar way to innocent passage through the territorial sea and transit passage through straits, the passage must be continuous and expeditious (article 53(3)) and archaeological research or excavation will fall outside innocent passage or archipelagic sea-lane passage and therefore will fall within the exclusive jurisdiction of the archipelagic State.

[44] Article 4 of the secretariat draft read; "1. State Parties, in the exercise of their sovereignty, have exclusive right to regulate and authorise activities affecting underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. 2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, State Parties shall take all necessary measures to ensure that, at a minimum, the operative provisions of the Charter be applied to activities affecting the underwater cultural heritage in their internal waters, archipelagic waters and territorial sea." This article replaced article 6 of the ILA draft, which stated that; "States Party shall transmit a copy of the Charter to all relevant authorities within their jurisdiction, requiring them to take appropriate measures to apply the Charter, at a minimum, to activity within their internal and territorial waters".

[45] CLT-96/CONF.202/5 Paris, April 1998 p.8; CLT-99/WS/8, Paris, April 1999 p.28

[46] 516 U.N.T.S 205.

International Law at The Hague in 1930, although the exact breadth was not agreed upon. Article 2 of the 1958 Convention states that "the sovereignty of the coastal state extends to the air space and over the territorial sea as well as its bed and subsoil." Any activities directed at UCH which lies in or on the seabed or subsoil of the territorial sea is therefore exclusively within the jurisdiction of the coastal State[47]. The exclusive jurisdiction is, however, limited by the concept of 'innocent passage' of vessels through this area.[48] Although the coastal State has limited jurisdiction in regard to vessels that are engaged in innocent passage, if a vessel is not engaged in innocent passage or has contravened its obligations of innocent passage, the coastal State has full legislative and enforcement jurisdiction.[49]

For the purposes of activities related to UCH, it must be determined whether archaeological or salvage surveys amount to innocent passage. In terms of the 1958 Convention, the coastal State has extensive powers to determine which activities it would regard as amounting to a threat to its "peace, good order or security", and could therefore define innocent passage very restrictively. Archaeological or salvage surveys would necessitate the extensive use of electronic remote sensing devices[50]. Should these not be necessary for normal passage, their use would undoubtedly be viewed by the coastal State as a threat to its 'peace, good order or security', and therefore not amounting to innocent passage. Most of these remote sensing devices are used in conjunction with the vessel navigating along a grid of survey lines, in order to survey a particular area. These movements would require intricate navigation and directional changes, and would certainly not amount to 'traversing" the territorial waters'.[51]

The 1982 United Nations Convention on the Law of the Sea [52]

UNCLOS III finally succeeded in settling the uncertainty over the breadth of the territorial sea, setting it at 12nm. The convention also strengthened and clarified the concept of 'innocent passage'[53] Article 18(2) states that 'innocent passage' must be 'continuos and expeditious'. A coastal State is also not required to show that the passage was a threat to its 'peace, good order or security' for the passage to be non-innocent, as article 19 sets out those activities which are regarded as non-innocent, such as the carrying out of 'research or survey activities'.[54] All activities 'not having a direct

---

[47] Del Bianco, H., "Underwater Recovery Operations in Offshore Waters: Vying for Rights to Treasure" 5 *Boston University International Law Journal* (1987) p.164

[48] Passage means "navigation through the territorial sea for the purposes of traversing the area without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters" and is innocent if it is not prejudicial to the "peace, good order or security" of the coastal State. Article 15(1) and 14(4); Strati *op.cit* p.117

[49] Articles 19 (criminal jurisdiction) and 20 (civil jurisdiction). Strati *op.cit* p. 117

[50] Such as echo-sounders, sonic bottom profilers, side-scan sonar, proton magnetometers and gravity measuring devises.

[51] Article 14(3) states that innocent passage includes stopping and anchoring, but only in so far as it is incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

[52] U.N. Doc. A/Conf.62/122; 21 I.L.M 1261

[53] Article 17 headed 'Right of innocent passage' states that; "[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." The meaning of 'passage' is set out in article 18, which reads; "1. Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility. 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

[54] Article 19(2)(j)

bearing on passage'[55] will also render the passage non-innocent, as will the 'loading or unloading of any commodity contrary to the customs and fiscal regulations'[56] of the coastal State. This would include the unloading or loading of any UCH which can be defined as a commodity.[57]

The clarification of the term 'innocent passage' has, however, also involved an increase in the limitation of the coastal State jurisdiction over vessels engaged in 'innocent passage'. Article 21 declares that the coastal State may only lay down laws and regulations which regulate 'innocent passage' for a number of specified activities[58], which include MSR and hydrographic surveys[59] and for the prevention of infringement of customs and fiscal, immigration or sanitary laws and regulation of the coastal State.[60] The coastal State may therefore not interfere with a vessel engaged in 'innocent passage', except in the instances set out in article 21. As vessels engaged in archaeological surveys and excavations are clearly not engaged in 'innocent passage', the coastal State has full jurisdictional rights within its territorial sea. As Strati clearly points out, article 21(h) does allow a State to lay down rules which govern the customs and fiscal regulations which relate to the trafficking of UCH. As long as the coastal State does not impose any requirements which will have the effect of denying or limiting the right of 'innocent passage', it may enforce its customs and fiscal laws relating to UCH.[61]

Article 303(1) imposes a duty on coastal States to preserve UCH found within its territorial sea. This, as Strati emphasis, is a positive duty which States party to the convention are bound to apply. To do so, coastal States need to adopt national legislation preserving UCH. As no standards are set, or criteria laid down for the way in which States are required to fulfil this obligation, those States that have passed national legislation have done so in an arbitrary manner, with little standardisation.[62]

---

[55] Article 19(2)(k)

[56] Article 19(2)(g)

[57] Strati defines a commodity as any good that can be valued in monetary terms and is capable of forming the subject matter of a commercial transaction. Strati *op.cit* p.122

[58] Article 21 states; headed 'Laws and regulations of the coastal State relating to innocent passage' states "(1) The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State. (2). Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. (3). The coastal State shall give due publicity to all such laws and regulations. (4). Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations

[59] Article 21(g)

[60] Article 21(h)

[61] Article 24(1)(a); For a discussion on the possible conflict between the right of innocent passage of a foreign vessel and the right of another vessel under coastal State jurisdiction to undertake recovery operations, see Strati *op.cit* pp.122-123

[62] See Prott, L.V. and O'Keefe, P.J., *Law and the Cultural Heritage: Volume 1, Discovery and Excavation* (1984) Professional Book Ltd pp.34-71, Strati *op.cit* pp.139-142 footnotes 26-29

The UNESCO draft convention

The sovereignty of the State has been recognised in article 4(1) to the extent that the coastal State has the *exclusive* right to regulate and authorise activities directed at UCH in internal waters, archipelagic waters and the territorial sea. Thus, no other State can compete with the coastal State with regard to this jurisdiction. This is consistent with the principle of State sovereignty in international law[63].

While the ILA draft convention had limited its scope to international waters, it did attempt to introduce the provision of the ICOMOS Charter in areas under the sovereignty of the coastal State.[64] Whilst the sovereignty of the coastal State was recognised in the secretariat draft, the negotiating draft introduced a requirement that the sovereignty of the coastal State be exercised either in 'accordance with article 2' or, 'without prejudice to article 2', where article 2 defines the scope of the convention[65]. Reference to article 2 in article 4 has caused debate and confusion. While some States have indicated a preference for either form[66], others have advocated the deletion of any reference to article 2[67]. As article 2 refers to the scope of the convention, questions concerning whether the convention will apply to territorial waters, internal waters or inland waters become entwined with questions of sovereignty, with some States regarding any attempt to impose a duty to apply the Rules of the Annex in these zones as an infringement of their sovereignty. However, a number of States regard this convention as a standards setting convention which should oblige State Parties to ensure that the standards set in the Annex are applied to UCH in all maritime zones, and possibly also in inland waters. They have therefore advocated that article 4(2) should be mandatory.[68] This does not, however, mean that all the provisions of the Convention will apply to the State Party's internal waters, archipelagic waters and territorial sea. A State Party will retain the exclusive jurisdiction to regulate and authorise all activities directed at UCH in these areas with the proviso that the rules in the Annex will be applied. Opposing this approach are a number of States which regard the mandatory approach as an obligation of resolve which is too strict a requirement for States to implement[69]. These delegations have therefore proposed that States be required to take 'all necessary measures' to ensure that the Annex is applied to UCH in these maritime

---

[63] Canada has advocated the deletion of article 4(1) for this reason. CLT-2000/CONF.201/3, Paris, April 2000

[64] The official comments to the ILA draft stated; "the Convention does not attempt to control standards of archaeology in internal waters or the territorial sea. A large number of States apply the same rules to underwater archaeology in these areas as they do to land archaeology. Consequently, any attempt to apply the requirements of the Convention in the territorial sea, for example, would require those States to change their laws or to separate the underwater aspects of those laws. This would be beyond the stated scope of the Convention. Nevertheless, in an attempt to further the implementation of the minimum standards, States party are encouraged to apply the provisions of the Convention and the criteria of the Charter to internal and territorial waters." O'Keefe and Nafziger *op.cit* p.410

[65] Which ever approach is chosen, is must be done in such a way as not to prejudice other international agreements and rules of international law, which would include UNCLOS, as well as any of the international or regional agreements entered into by the contracting States to protect cultural heritage, such as the 1954 Hague Convention, the 1970 UNESCO Convention and the 1972 World Heritage Convention.

[66] Spain, for example, would prefer the use of the phrase "without prejudice to article 2". CLT-2000/CONF.201/3, Paris, April 2000 p.7

[67] Both UK and Uruguay supported the deletion of any reference to article 2. CLT-2000/CONF.201/3, Paris, April 2000 p.7

[68] The strongest supporter of this approach is Australia, while Algeria and Chile have also supported the mandatory approach.(1999 Meeting). Uruguay, however, favoured the discretion term "should take all necessary measures to ensure" CLT-2000/CONF.201/3, Paris, April 2000

[69] States in support of this approach include the US, UK, Argentina, Canada and Italy (1999 meeting)

zones. The requirement that a coastal State ensure the rules in the Annex are applied to activities affecting the UCH in these maritime zones, may be to ensure conformity with the provisions that will apply in the areas outside its exclusive jurisdiction. If a State cannot ensure that the rules of the Annex are applied to UCH in these zones, but is bound to apply them to UCH in international waters, the effect may be that for some States the domestic law applicable to UCH found within the internal waters and territorial waters provides a lessor degree of protection than that applicable to UCH found outside the territorial sea. The State will, in effect, have a dual system of law applicable to UCH. Without knowing where the recovery took place, it may be difficult for a State to determine exactly which law to apply to a given recovery.

A further concern that initiated inclusion of a reference to article 2 in article 4(1) is in respect of the inclusion of State owned vessels in the scope of the convention. Those States that wish to retain flag State jurisdiction over their vessels within these maritime zones of another State have therefore advocated that the exercise of the coastal State's exclusive jurisdiction will not prejudice their rights in regards to these vessels.[70] Should these vessels fall within the scope of the convention, then article 4(1) will have the effect of ensuring that a State Party's exclusive jurisdiction is limited by the terms of the convention, thus restricting the exercise of their sovereignty[71]. Those States that oppose the application of the convention to the zones under their exclusive jurisdiction emphasised that to do so would not only be regarded as a limitation on the exercise of its sovereignty, but would also require, in some cases, changes in the national law so as to bring it into conformity with the convention, which may not always be possible, particularly in federal States.[72]

These consequences may, however, simply be a reflection of the State Parties agreeing to be bound by a convention in international law. They are the international obligations and consequences of participating in the international process. A State Party may therefore agree that it will exercise this sovereignty in accordance with the convention. This agreement is in itself, an exercise of State sovereignty in international law.

Non-use of areas under the jurisdiction of the coastal State

Coastal States[73] have the discretion to determine the conditions of entry of vessels to its ports. This could have an affect on those research or salvage vessels which, having

---

[70] It is interesting to note that the Spanish delegation argued that should the sovereignty of the coastal State not be restricted (so that the flag State of a sunken vessel no longer retains jurisdiction over that vessel if it is in the maritime zones covered by this article), then an additional paragraph should be added to article 4 which would bind the coastal State to co-operate with the flag State of the vessel. This, once again, is a Spanish proposal that may have its origins in debate concerning the recovery of the *Juno* and *La Galga*, vessels of Spanish origin which floundered in what is now the territorial waters of the US. (1999 meeting).

[71] Egypt has interpreted this coastal State sovereignty as advocating State ownership of all UCH within its territorial waters. In 2000, Egypt proposed the inclusion of a paragraph which read; "[e]ach State party to this convention recognises that the duty of ensuring the identification, protection and conservation of the underwater cultural heritage referred to in Articles 1 and 2 and situated in its internal waters, archipelagic and territorial sea, belongs to that State in the exercise of its sovereignty." CLT-2000/CONF.201/3, Paris, April 2000 p.7

[72] CLT-99/WS/8, Paris, April 1999 p.28

[73] The rights and duties of States with regard to the regulation of vessels entering its inland waters and ports are determined by the 1958 Conventions and UNCLOS, and are basically the same in these conventions except for minor changes which take into account the formation of the two new maritime zones; the archipelagic waters and the EEZ. Caflish, L., "Submarine Antiquities and the International Law of the Sea" 13 *Netherlands Lawbook of International Law* (1982) p.10; For a discussion on the rights of entry to marine ports in international law, see Strati *op.cit* p.135 fn.6

undertaken activities directed at UCH outside the coastal State's jurisdiction, enter that port for victualing[74]. Ports are presumed to be open to all shipping, though entry and customs requirements may be set. These may include provisions relating to the use of the vessel for archaeological surveys and recovery, as well as relating to the traffic in recovered UCH.[75] The research vessel may be private or public, the former normally being dealt with as merchant vessels and therefore subject to less stringent coastal State scrutiny or regulations than the latter, normally comprising military vessels.[76]

Although a coastal State may regulate entry into its port, it will not be able to regulate recovery operations beyond the CZ as a State cannot exercise extra-territorial jurisdiction. A coastal State cannot therefore institute proceedings against a vessel which has undertaken excavation activities in a manner which, had they occurred within the coastal State's territory, would have infringed its heritage laws. If, however, UCH is actually brought into the State's territory, then a State will have jurisdiction.[77] During UNCLOS III negotiations, it was suggested that the coastal State may make access to research vessels undertaking activities directed at UCH outside the coastal State's jurisdiction conditional on the manner in which these activities were conducted. A coastal State could therefore deny entry to those vessels that have undertaken activities contrary to the coastal State's regulations, even though the actual activity took place outside the coastal State's jurisdiction. Unfortunately this proposal was not included in the convention. However, the lack of an express international provision does not derogate from the coastal State's discretion to determine the conditions of entry to its ports and it could include regulations preventing the entry into its jurisdiction of vessels involved in the excavation of UCH sites in a manner which would conflict with its heritage laws, irrespective of whether any artefacts themselves are brought into the coastal State's jurisdiction. Such unilateral State action could be viewed as conforming to States' duties to preserve UCH under article 303(1). However, the failure to include consensual international entry regulation governing such activities results in the inability to effectively regulate the recovery of UCH.

The UNESCO draft convention attempts to overcome this problem by introducing the mandatory obligation for States to prohibit the use of its ports and other territories for activities directed at UCH taking place in areas where no coastal State exercises jurisdiction with respect to UCH[78]. However, these regulations will only prevent entry to a coastal State's ports and not prevent the actual recovery of the UCH, and, unless the logistics of the operation make that coastal port the only viable victualing station, the salvage vessel would simply berth in a port with less stringent entry regulations. As O'Keefe points out, this method will only be effective if a large number of States become party to the convention.[79] Nevertheless, this is an extremely useful weapon in the arsenal of preservation measures.

---

[74] Article 211(3) of UNCLOS reserves the discretionary rights of coastal States to prevent the entry of vessels into its ports, particularly if it fears that the vessel is a pollution risk. Strati *op.cit* p. 115

[75] *Ibid.* p.135

[76] Military vessels have recently been used to undertake archaeological research in international waters. The US Navy have made their nuclear submarine, NR-1 available to the Institute of Exploration for Archaeological Research. Under the directions of Dr Robert Ballard, the NR-1 has been used in the Mediterranean to search for underwater cultural heritage at depth in excess of 3000 feet. See Delgado, J.P., "Lure of the Deep" 49(3) *Archaeology* (1996) p.43; Strati *op.cit* p.134 fn.5

[77] A coastal State may impose customs and tax regulations on artefacts entering the States ports. For example, the US congress considered legislation to prevent the importation of artefacts salvages from the wreck of the *RMS Titanic*. Strati *op.cit* p.116

[78] CLT-96/CONF.202/5 Paris, April 1998

[79] O'Keefe, P.J., "Protection of the Underwater Cultural Heritage" 25(3) *International Journal of Nautical Archaeology* (1996) p.171

Article 6 of the secretariat draft stated;

"1. No State Party shall allow use of its territory, including its marine ports and offshore terminals, or other areas under its jurisdiction such as the continental shelf or exclusive economic zone, in support of any activity affecting underwater cultural heritage and inconsistent with the provisions of the Charter.

2. This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises controls over the exploration, excavation and management of the underwater cultural heritage in accordance with Article 5(2) of this Convention unless requested by that State".

Although the general principle underlying article 6 received broad consensus at the meeting of experts[80], it was drafted within the context of the regime that included the extension of coastal State jurisdiction over the EEZ and CS. As a number of States have objected to this extension, alternative versions of article 6 have been proposed[81]. The requirement that the coastal State not allow the use of its territory, particularly its ports, in support of activities directed at UCH that is not undertaken in conformity with the provisions of the Annex is an important preservation mechanism. This mechanism has been used by the IMO for the protection of the marine environment and has recently been the subject of a number of Memoranda of Understanding at regional levels to implement IMO conventions. The possibility of creating similar memoranda to control the movement of illicit UCH would greatly strengthen the effectiveness of the UNESCO convention.

---

[80] Japan, however does not support either version of article 6 in options 1,2 and 3 of the negotiating draft, considering such jurisdiction contrary to that conferred by UNCLOS. CLT-2000/CONF.201/3, Paris, April 2000 p.10, 11and 13.

[81] The States which have supported the expansion of coastal State jurisdiction over the EEZ and CS, and which proposed Option I of article 5 have proposed the following wording for article 6; "State Parties shall take measures to prohibit the use of their territory, including their marine ports and offshore terminals, or other areas under their jurisdiction or control in support of any [activity directed at] underwater cultural heritage and inconsistent with the rules in the Annex." Article 6(2) was deleted after objections to its inclusion by a number of States, including Argentina, Chile, Australia, Tunisia and the US (1999 meeting). This version of article 6 is a much simplified version of the original article as it eliminates any specific mention of the areas over which the coastal State may have some measure of jurisdiction or control, particularly the EEZ and CS. Thus, it requires States to ensure that any areas under its control are not used in support of activities directed at UCH and inconsistent with the Rules in the Annex. This could include the territorial sea and therefore supports article 4 in that the State Party will have to ensure that the Rules in the Annex are applied to UCH recovered in the territorial sea. There were some proposals to alter the wording of this article. Australia, for example, preferred the use of the word 'prevent' rather than 'prohibit' in article 6(1) as the latter requires the imposition of stricter judicial regime than the former. (1999 meeting), while Canada proposed that the territorial sea be specifically included in article 6 as an area over which the State has jurisdiction and may take measures to prohibit activities that contravene the Rules of the Annex. CLT-2000/CONF.201/3, Paris, April 2000 p.10. Those States which have argued that article 5 should not extend coastal State jurisdiction have taken the above considerations into account, and proposed an alternative that eliminates reference to the EEZ and CS and, though it does retain article 6(2), it does simplify the provisions of that article. This option reads; "(1) All State Parties shall take measures to prohibit the use of its territory, including their marine ports and offshore terminals, or other areas under their jurisdiction or control in support of any [activity directed at] underwater cultural heritage and inconsistent with the rules in the Annex. (2.) This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises control in accordance with [customary international law as reflected in the UN Convention on the Law of the Sea] unless requested by that State." (A third option was included by the Chairperson of the third working group at the 1999 meeting, which would include the original article 6 and a subparagraph of article 5. This proposal appears under the discussion of article 5).

Extensions of jurisdiction: Functional jurisdiction in the CZ, CS and EEZ

While both the ILA draft and the UNESCO secretariat draft include proposals for the extension of coastal State regulatory jurisdiction beyond the CZ, these attempts are not unique, and have their origins as a preservation mechanism for UCH in negotiations at UNCLOS III. As such, it is worth briefly considering the negotiations regarding article 303.

Drafting history of article 303

While the first committee of UNCLOS had been involved with the formulation of an agreement concerning the seabed, and the resulting article 149, the second committee had also raised the question of UCH found in the other maritime zones. The original Greek proposal at the eighth session of the Conference in 1979[82] addressed the regulation of UCH found on or under the CS and on or under the seabed and subsoil of EEZ, and proposed that the coastal State should have exclusive jurisdiction over UCH in these zones[83]. However, a State that could be regarded as the State of cultural origin would be entitled to preferential rights if the artefacts were disposed of. A number of alternative proposals were made during the resumed eighth session, limiting the coastal State's jurisdiction to UCH found on or under the CS, and abandoning the claim for jurisdiction over objects found on the seabed and subsoil of the EEZ[84]. The US, UK and the Netherlands were, however, strongly opposed to this proposal for four reasons: (a) the text was vague and it failed to provide for a solution for the conflicting interests that could arise between the States entitled to preferential rights[85], (b) it failed to take into account national salvage law, (c) it would necessitate re-opening negotiation on the CS, which had already been concluded and (d) it extended State jurisdiction over the CS and was not related to the right with respect to natural resources already agreed upon.[86] At the resumed ninth session in Geneva (1980), the same group of States introduced a proposal which was seen as less radical than their previous proposals in that it made no reference to the CS or EEZ, and instead of referring to the coastal State's jurisdiction, the proposal simply referred to the "enforcement of laws and regulations" of the coastal State. Though recognising the necessity of introducing a general duty to protect UCH, the US regarded the rights of identifiable owners and the place of salvage and admiralty

---

[82] C.2/Informal Meeting/43, 16 August 1979.

[83] The text proposed for the Informal Composite Negotiating Text read; "(a) The coastal state exercises sovereign rights over any object of purely archaeological or historical nature on the seabed and subsoil of its exclusive economic zone/on or under its continental shelf for the purposes of research and salvage. (b) However, regarding archaeological or historical objects originating from a state or country or from a state of cultural origin other than the coastal state, the state of the primary origin will have, in case of disposal, preferential rights."

[84] During the ninth session in 1980, the following proposal was made; "[t]he coastal State may exercise jurisdiction, while respecting the rights of identifiable owners, over any object of archaeological and historical nature on or under the continental shelf for the purposes of research, recovery and protection. However, particular regard shall be paid to the preferential rights of the State or country of origin, or the state of cultural origin, or the state of historical and archaeological origin, in case of sale or other disposal, resulting in the removal of such objects out of the coastal state." (UN Doc C.2/Informal Meeting/43). This was originally proposed as a fifth paragraph to article 77 dealing with the right of the coastal States over the continental shelf by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia.

[85] Strati *op.cit* p.164

[86] GP/4, 27 March 1980; see Caflish *op.cit* p.17

law as a contentious issue, as was the geographical extent of these rights[87]. The US delegation made a proposal that would introduce a general duty to protect UCH[88] This general duty was however, vague and unsatisfactory. The Greek delegation, in an attempt to compromise, then proposed to limit the coastal State jurisdiction to 200 nm.[89] The US reply to the Greek proposal, again as a compromise, attempted to limit coastal State jurisdiction to the CZ.[90] This proposal was successful and became the basis of article 303, with section 303(2) limiting coastal State jurisdiction to the CZ by the use of a legal fiction. This was essentially a compromise between those States (particularly some Mediterranean States) who wanted UCH protected preferably up to the outer limits of the CS, and those maritime States (particularly the US) who wanted to limit coastal State jurisdiction to a general duty which would not extend beyond the territorial sea. Thus, while the coastal State's jurisdiction was extended over the CZ, States were very reluctant to extend it any further.

Contiguous zone

Article 24(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone[91]states that;

"[i]n a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to
(a) prevent infringements of its custom, fiscal, immigration and sanitary regulations within its territory or territorial sea;
(b) punish infringements of the above regulations committed within its territory or territorial sea."

This would not allow a coastal State to extend its legislative jurisdiction to cover the CZ[92]. This zone was intended as a 'buffer zone'[93]; one in which the coastal State may exercise a preventative function, by preventing vessels from entering the territorial sea if the vessel would infringe the customs, fiscal, immigrations or sanitary laws of the

---

[87] The US Delegation Report stated; "[w]hile all nation recognise the importance of the need to protect objects of an archaeological and historical nature, a seven-nation proposal to this effect was not included in the ICNT, Rev.2, because it was perceived as having the potential for upsetting the delicate balance between coastal State rights and obligations and the rights and obligations of other States. The text was also vague and, if adopted, could have led to disputes between States with no guidelines as to how they might be resolved." See Arend, A. C., "Archaeological and Historical Objects: Implications of UNCLOS III" 22 *Virginia Journal of International Law* (1982) p.795

[88] The US proposal read; "[a]ll States have a duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the State of origin, or the State of cultural origin, or the State of historical and archaeological origin of any objects of an historical or archaeological nature found in the marine environment in the case of sale or any other disposal, resulting in the removal of such objects from the state which has possession of such objects." U.N Doc A/CONF.62/GP/4

[89] The Greek proposal read; "1. All States have a duty to protect in a spirit of co-operation, objects of archaeological or historical value, found in the marine environment. 2. Nothing in this Convention will be deemed to prevent coastal states from enforcing, in an exclusive manner, their own laws and regulations concerning such objects up to a limit of 200nm from the baseline from which the breadth of the territorial sea is measured, while still respecting the rights of identifiable owners. 3. The State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin of the object shall enjoy preferential rights in case of sale or any disposal resulting in its removal from the state where it is situated." U.N. Doc No. A/CONF.62/GP/10
GP/10, 18 August 1980

[90] GP/11, 19 August 1980

[91] 516 U.N.T.S 205

[92] Strati, however, notes that in practise States have readily extended their legislative jurisdiction to cover the CZ. See Strati *op.cit* p.160

[93] The creation of this buffer zone was essentially a compromise between those States that favoured a three-mile territorial sea and those who favoured a more extensive territorial sea. Del Bianco *op.cit* p.165

coastal State if it did enter the territorial sea; and a punitive function, by undertaking activities aimed at ensuring the arrest and punishment of those who have infringed the customs, fiscal, immigration or sanitary laws of the coastal State, the infringement having occurred within the territory or territorial sea of the coastal State. The CZ is, in principle, a part of the high seas, and the limited exceptional rights of the coastal State should therefore be interpreted restrictively.[94] The coastal State therefore has no jurisdiction over the seabed and subsoil. Caflish identifies three instances where article 24 may have a bearing on UCH found in the CZ. Firstly, when a foreign vessel in the CZ is attempting to import UCH from outside the coastal State's territory into its territory contrary to the coastal State's custom or fiscal laws; secondly, when the foreign vessel has in fact succeeded in importing UCH in the first instance into the coastal State's territory, and thirdly, when a foreign vessel in the CZ is attempting to export UCH from the coastal State's territory contrary to the coastal State's customs or fiscal laws.[95] The coastal State will therefore only have jurisdiction over the traffic in UCH and no control over the search for or recovery of UCH in the CZ.

Article 33[96] of UNCLOS is almost identical to article 24 of the 1958 Convention and can safely be regarded as customary international law. Article 33 is referred to in article 303(2), which governs the preservation of UCH found on the seabed of the CZ. Although the extent of the coastal State's rights and jurisdiction over UCH under article 303 are susceptible to various interpretations, it would appear from the writings of a number of commentators, that article 303 at least allows the coastal State to directly control the recovery of objects from the CZ as if those objects were recovered from its territorial sea[97]. It would appear that in order for the coastal State to exert this legislative control, it would have to declare a CZ. A limited number of States have in fact passed legislation that purports to control the recovery of UCH from the CZ, including China[98], Denmark[99] and France[100].

Neither the ILA draft convention nor the UNESCO secretariat draft convention made explicit reference to the CZ. The reason for this is that in both drafts, the jurisdiction of the coastal State to regulate and authorise activities directed at UCH had been extended to include the EEZ and CS[101]. As the CZ would be encompassed within these maritime zones, it was considered unnecessary to provide for a separate article concerning this zone. However, a number of States have recently advocated such a separate article[102].

---

[94] Strati *op.cit* p.160

[95] Caflish *op.cit* p.13

[96] Article 33 of UNCLOS states: "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal state may exercise the control necessary to; (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringements of the above laws and regulations committed in its territory or territorial sea.

[97] Alexander argues that this extension of control of the coastal State means that the admiralty courts of the coastal State should therefore be able to exercise *in rem* jurisdiction over UCH recovered in the CZ. Alexander *op.cit* p.8

[98] The Regulation on Protection and Administration oh Underwater Cultural Relicts Regulations 1989. See Zhao op.cit pp.305-333

[99] Conservation of Nature Act 1984

[100] Act Concerning Marine Cultural property 89-874 of 1989 of 1December 1989. See further, Firth. A., "Archaeology Underwater in France" 7 *International Journal of Estuarine and Coastal Law* (1992) p.57

[101] Some States, such as Australia and Canada continue to regard the inclusion of an article concerning the CZ as unnecessary, as it would be included in their assertion that coastal States jurisdiction could be extended over the EEZ and CS. CLT-2000/CONF.201/3, Paris, April 2000 p.8

[102] The Spanish delegation suggested that article 4 of the UNESCO draft should include the CZ. Similarly, the US proposed that the existing article 5 should be substituted with an article extending coastal State jurisdiction to the CZ. CLT-99/WS/8, Paris, April 1999 p. 28. Italy, Finland and Denmark also supported the inclusion of article 4a. The latter has already extended its UCH legislation to cover

Most notable are States which are opposed to the jurisdiction of the coastal State over the EEZ and CS[103]. Article 4a is therefore introduced to make it clear that they wish a distinction to be made between the regime that will apply in the CZ and that which would apply in the EEZ and CS. The final working version of article 4a reads;

"State parties may [in applying Article 303(2) of the UN Convention on the Law of the Sea] regulate and authorise, [in accordance with Article 303(2) of the UN Convention on the Law of the Sea,] [activities directed at] underwater cultural heritage within their contiguous zone. In doing so, State Parties [shall][should] require compliance, at a minimum, with the Rules in the Annex".

As is evident from the number of square brackets, it has been difficult to reach consensus on article 4a. Two issues arise. The first concerns the relationship between the jurisdiction to be allocated under the UNESCO convention and that existing under UNCLOS. The second issues concerns the extent to which a State's duty to apply the rules of the Annex should be mandatory.

The effect of article 303 of UNCLOS and the ability of a coastal state to regulate the recovery of UCH from the CZ has been covered above. To summarise, although the extent of the coastal State's rights and jurisdiction over UCH under article 303 are susceptible to various interpretations, it would appear that article 303 at least allows the coastal State to directly control the recovery of objects from the CZ as if those objects were recovered from its territorial sea through the use of a legal fiction. The ability to extend the coastal State's jurisdiction in accordance with article 303 is dependent upon the coastal State having declared a CZ. This extended jurisdiction is, however, not extensive. Article 303(2) relates to the "removal from the seabed" of UCH and will not cover activities such as diving on, filming, or in some way damaging the UCH[104]. It would therefore not relate to the search for UCH.

Article 303 is specifically incorporated into article 4a of the draft convention, although the manner of incorporation has not been agreed upon. Two options have been proposed. The first option reads, "State parties may, *in applying* Article 303(2) of the UN Convention on the Law of the Sea, regulate and authorise activities directed at underwater cultural heritage within their contiguous zone."[105] This presupposes that the coastal State has declared a CZ and is applying article 303(2) in order to regulate the recovery of UCH in the CZ. Article 4a however, takes this jurisdiction a step further in that in applying article 303(2), a coastal State may "regulate and authorise activities directed at UCH" which confers greater regulatory jurisdiction than does article 303(2)[106]. As such, the coastal State is not restricted to regulation of the "removal from the seabed" of UCH, but any activity 'directed at' UCH[107]. The second option reads, "State parties may regulate and authorise, *in accordance* with Article 303(2) of the UN

CZ. The Italian parliament is currently considering extending national jurisdiction to cover the CZ. (1999 Meeting). However, a number of State have opposed article 4a, in particular Turkey. Referring to these States, Bederman suggests that it is unlikely that coastal States will " trade unilateral authority over cultural property in the contiguous zone for a right to enforce international recovery guidelines out to 200nm" See Bederman D.J., "Historic Salvage and the Law of the Sea" transcript of paper Presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, Florida, March 30-31 1998

[103] This includes the US, UK and Norway

[104] Newton, C. F., "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention" 10 *Hastings International and Comparative Law Review* (1986) pp.159-197

[105] Own emphasis, brackets and second option deleted.

[106] The Irish delegation have suggested that as it is not clear what activities article 303(2) governs, it may be in conformity with UNCLOS, and therefore would support article 4a. (1999 Meeting)

[107] Sweden noted that this will result in an expanded interpretation of article 303(2). The delegation therefore preferred not to include any reference to 303(2) (1999 Meeting)

Convention on the Law of the Sea, activities directed at underwater cultural heritage within their contiguous zone."[108] This could be interpreted to mean that the regulation of the coastal State must accord with that contained in UNCLOS, thus adding nothing to the jurisdiction that already exists. This has a far more limiting effect on the coastal State's jurisdiction in the CZ than the first option[109]. Any reference to article 303 must therefore be regarded as an attempt to limit the coastal State's jurisdiction in the CZ to that which already exists.

Having determined the scope of the coastal State's jurisdiction to regulate and authorise activities directed at UCH in the CZ, the second issue under debate concerned the possible mandatory requirement that the coastal State apply the rules in the Annex to these activities. The requirement that a State is bound to apply the rules of the Annex to UCH in this zone presupposes that article 4a extends the scope of the jurisdiction of the coastal State beyond that provided for in article 303(2) of UNCLOS. This conclusion can only be reached as the rules of the Annex contain certain provisions for *in situ* preservation that would not be possible if the UNCLOS regime was made applicable. A number of States have also regarded the mandatory application of the rules of the Annex to be too strict an obligation, and have therefore sought a limited obligation requiring States to attempt to apply the rules of the Annex[110]. This, however, also presupposes an extension of coastal State jurisdiction over that provided for in article 303(2). It would therefore appear that article 4a is envisaged to be an extension of the regime existing under UNCLOS. As States are not required to extend their jurisdiction over the CZ, it is suggested that having made that choice, they should be bound to apply the provisions of the convention to UCH in that zone.

As a number of States, such as the US, have supported the inclusion of article 4a in the draft convention, it is presumed that these States regard this extension as justified under UNCLOS. This, however, would not appear to conform to the position taken by these States in regard to article 5, in which the jurisdiction of the coastal State in the EEZ and CS have been extended beyond that allocated under UNCLOS[111]. Given the uncertainties regarding the interpretation of article 303, any reference to it in article 4bis results in the article suffering inherited interpretational difficulties.

The continental shelf

The Geneva Convention on the Continental Shelf

The coastal State has the sovereign right to explore and exploit the natural resources of the CS[112]. The ILC's commentary on the original draft of article 2 stated that "it is

---

[108] Own emphasis, brackets and first option deleted.

[109] The UK have specifically supported the use of this alternative phrase. CLT-2000/CONF.201/3, Paris, April 2000 p.8

[110] This included Russia, UK, US and Chile

[111] This controversy has brought to the surface the age-old problem of the jurisdiction of one State's island on another State's CS. In particular, the dispute between Turkey and Greece was again raised during the UNESCO negotiations, and threatened to provide the same arguments as those which caused the 1985 Europe draft convention to fail. Greece raised the question of islands that have autonomous rights. Therefore a Greek island on the Turkish CS could extend its jurisdiction to cover CZ or EEZ at the expense of the Turkish CS. Turkey raised the issues of semi-enclosed seas that do not admit to the adaptation of the CZ and requested a semi-enclosed exception to the application of article 4a. Greece objected to this suggestion, which has been noted as a footnote in the draft convention. CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[112] Article 2 states; "1. The coastal State exercises over the continental shelf sovereign rights for the purposes of exploring and exploiting its natural resources. 2. The rights referred to in paragraph 1 of this

clearly understood that the rights of the coastal state do not cover objects, such as wrecked ships and their cargo (including bullion) lying on the seabed or covered by the sand and subsoil."[113] The convention itself does not specifically deal with UCH on the CS. The ILC commentary, however, should not necessarily be regarded as authoritative, as it is merely an interpretation of a draft article by the ILC and which may or may not have been accepted by member States of the convention[114]. Some commentators, such as Arend[115], Zhao[116] and Meenan[117] have therefore suggested that the term 'natural resources' could be widely construed to include UCH. This would, however, appear to be an unduly wide interpretation and relies on the fact that a literal interpretation of the treaty does not suggest that UCH is excluded. As the term 'natural resources' is defined in article 2(4) to include only minerals, non-living resources and living resources of sedatory species, it would seem that UCH is excluded.[118]

Article 3 of the convention states that "the rights of the coastal state over the continental shelf do not effect the legal status of the super-adjacent waters as high seas, or that of the airspace above the waters" The rights of the coastal State are therefore limited to the exploration and exploitation of the 'natural resources' of the CS, and, as UCH does not fall within the category of 'natural resources', the search for and recover UCH on the CS must be regarded as a freedom of the high seas.

While article 2 vests the exploration and exploitation of the natural resources of the CS in the coastal State, article 5(1)[119] requires the coastal State to recognise the right of other States to undertake scientific research on the CS, and to ensure that the activities of exploring and exploiting the natural resources of the CS do not interfere with the freedom to undertake scientific research. Article 5(8)[120] does, however, require coastal State consent for "any research concerning the continental shelf and undertaken there",

---

article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State. 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation. 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with the living organisms belonging to sedentary species, that is to say, organisms which, at the harvest stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".

[113] U.N.Doc A/3159 11 GAOR Supp. (No.9). This commentary was regarded as an authoritative interpretation by the US Court of Appeal in the *case Treasure Salvors, Inc v. Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330, 340 (5th Cir. 1978). Zhao *op.cit* p. 318. Also see Strati *op.cit* p.250 and Arend *op.cit* p.784

[114] Zhao points out that Australia is a party to the 1958 Convention, yet has extended its national legislation (Historic Shipwrecks Act 1976) regulating activities directed at UCH on the CS. See Zhao *op.cit* p.318

[115] Arend *op.cit* p.784

[116] Zhao *op.cit* p.318

[117] Meenan, J. K., "Cultural resource presentation and underwater archaeology. Some notes on the current legal framework and a model underwater antiquities statute." 15 *San Diego Law Review* (1978) pp.623-662

[118] This conclusion is supported by Dromgoole *op.cit* p.4-30, Caflish *op.cit* p.14 and Allen *op.cit* p.20

[119] Article 5(1) states; "[t]he exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication."

[120] Article 5(8) states; "[t]he consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the provision that the coastal State shall have the right, if so desired, to participate or to be represented in the research, and that in any event the results shall be published."

though this consent should not be withheld if the requesting State authority is appropriately qualified and undertaking legitimate scientific research which will result in scientific publication. The coastal State also has the right to participate in any scientific research of the CS. As the coastal State's rights to the CS are limited to the exploration and exploitation of natural resources, it is submitted that article 5(8) should be narrowly interpreted so as to exclude archaeological research.[121] Consent would therefore not have to be obtained from the coastal State for archaeological research. However, archaeological research often makes use of scientific equipment which is capable of providing data on the natural resources of the CS. Similarly, many archaeological research activities are conducted in conjunction with research on the natural resources of the CS,[122] and it is increasingly common to undertake biological research on the organisms that attach themselves to UCH. It may then be that a coastal State could require prior permission before such research is undertaken. The possibility of a conflict in defining the primary objective of the operation could conceivably occur. Similarly, any archaeological recovery operation will involve a disturbance of the seabed of the CS, and possibly also of the natural resources of the CS. If this is a possibility, then the coastal State could invoke all its rights to control the natural resources of the CS and therefore exercise *de facto* control of archaeological recovery operations[123].

The 1982 United Nations Convention on the Law of the Sea[124]

Article 77 of UNCLOS is almost identical to that of article 2 of the Geneva Convention, limiting the sovereign rights of the coastal State to the exploration and exploitation of the natural resources of the CS, which exclude UCH. The drafting history of article 303 indicated a desire of a number of States to extend coastal State control over UCH on the CS, but the final compromise limited the coastal State jurisdiction over UCH to the CZ The obligation of a flag State to obtain consent for MSR[125] on the CS from the coastal State is retained,[126] as has the rights of the coastal State to participate in the research.[127]

Activities directed at UCH, as discussed under the Geneva Convention, have an effect on the natural resources of the CS, and allow the coastal States to have a certain amount of control over such activities. This control may be strengthened if article 303 is to be interpreted as applying to all the maritime zones. Although the extent of the duty under article 303(1) is vague, it is conceivable for a coastal State to interpret this duty as allowing the extension of coastal State's national heritage over the CS,[128] although it is

---

[121] The ILC report, in its comments on article 5(8) stated that; "[t]he consent of the State will only be required for research relating to the exploration or exploitation of the seabed or subsoil." *Report of the International Law Commission to the General* Assembly U.N.Doc. A/3159 (1956). See also Strati *op.cit* pp.254-257 concerning the various interpretations of article 5(8). Also see Arend, *op.cit* p.785 , Caflish *op.cit* pp.13-14

[122] The search for the *RMS Titanic* was originally sponsored by scientific research teams from the U.S Woods Hole Oceanographic Institute and the French Institute for Marine Exploration (IFREMER). Newton *op.cit* p.179. See generally Ballard, R.D., *The Discovery of the Titanic* (1987) Guild Publishing London

[123] This possibility could also occur under UNCLOS.

[124] 21 I.L.M 1261 (982)

[125] For further details concerning Marine Scientific Research under the Law of the Sea Convention see Anon., *Marine Scientific Research: A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* Published by the Office for Ocean Affairs and the Law of the Sea

[126] Article 246(2)

[127] Article 249(1)

[128] A number of States have extended their national legislation to cover UCH found on the CS, including Australia (Historic Shipwrecks Act No. 190 of 1976), Ireland (National Monuments (Amendment) Act

submitted that this interpretation would not be in accordance with the intention of the Conference[129].

Article 80[130] grants the coastal state the "exclusive right to conduct and to authorise the construction, operation and uses of installations and structures for the purposes provided in article 56 and other economic purposes." It may therefore be that coastal State consent would be required if UCH recovery operations were to make use of such structures or installations.[131] Similarly, article 81 gives the coastal State the exclusive rights to authorise and regulate drilling on the CS, and therefore, may regulate any archaeological excavation that may use drilling into the seabed, though this regulation would only relate to the actual drilling, and not to the remaining excavation activities[132]. Dromgoole regards it as rather optimistic in considering the use of article 81 as a reliable means to regulate salvage operations.[133] The requirement of obtaining coastal State permission in these circumstances would at least inform the coastal State of the excavation activities[134]. In practise, most States would require permission to be granted for any research on the CS for reasons of economic and military security.[135]

The Exclusive Economic Zone

Article 56 of UNCLOS states that:

"[i]n the exclusive economic zone, the coastal state has:
(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the water superadjacent to the sea-bed and of the sea-bed and subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  (i) the establishment and use of artificial islands, installations and structures;
  (ii) marine scientific research;
  (iii)the protection and preservation of the marine environment ;
(c) other rights and duties provided for in this Convention."

The EEZ is a creation of UNCLOS. It was introduced in order to protect the fisheries resources of developing countries from the long-distance fishing fleets of the major fishing nations and the prevention of pollution.[136] Coastal States have been given explicit rights in this zone in article 56 while the rights of flag States have been expressly described in article 58, and include many which would be regarded as freedoms of the high seas, such as freedom of navigation, overflight and the laying of

---

1987), Seychelles (Maritime Zones Act 1977), Cyprus (Law No.4 of 1974), Norway (Section 44 of the Royal Decree of 8 December 1972 and Portugal (Law No. 289/93 of 21 August 1995). Although the US has not done so, it has enabled the wreck of the *USS Monitor* to be protected on the CS through the designation of a marine sanctuary under the Marine Protection, Research and Sanctuaries Act 16 U.S.C. 1985.

[129] Allen proposes the development of a single State jurisdictional regime over UCH found on the CS. See Allen, B. L., *Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the UN Law of the Sea Convention 1982* (1991) Special Publication of the Institute of Maritime Law, University of Cape Town Publication no. 14. 1991pp.45-58

[130] Applying the same provisions as article 60 does in the EEZ

[131] For a more detailed discussion of this point, see Strati *op.cit* pp.266-267

[132] A similar situation applies in relation to the coastal State's right to authorise and control tunnelling activities into the continental shelf by virtue of article 85.

[133] Dromgoole. S and Gaskell. N., "Interest in Wreck: Part I" 2(2) *Art, Antiquity and Law* (1997) p.108 footnote 54.

[134] Allen *op.cit* p.21

[135] Blake *op.cit* p.83; Also see Strati *op.cit* pp.292-294, notes 100-109

[136] Strati *op.cit* p.264

submarine cables and pipelines. The explicit division of rights between the coastal State and other States (including land-locked States[137] and geographically disadvantaged States[138]) and the provision for the resolution of disputes in article 59 have lead to the EEZ being described as *sui generis*. This would mean that any residual rights would neither fall within the coastal State's sovereignty nor under the freedom of the high seas, in which case the right to conduct such activities must be determined under article 59[139].

It is not entirely clear whether activities directed at UCH in this zone are included in the scope of article 56, thus falling within the jurisdiction of the coastal State, or article 58, thus amounting to a freedom of the high seas. It is also possible that is falls within the scope of neither article and therefore susceptible to determination in accordance with article 59.

Although article 56 includes the phrase "other activities for the economic exploitation and exploration of this zone", it is qualified by a number of examples of such other activities, such as "the production of energy from the water currents and winds". The other activities are therefore related to the natural features of the zone and should not be interpreted to include any other activities. Archaeological research and recovery would therefore not appear to fall within the rights of the coastal State as described in article 56. However, a number of commentators have argued that the coastal State does have the jurisdiction to regulate activities directed at UCH in the EEZ[140]. Zhao argues that as article 56(1)(c) refers to 'other rights and duties provided for in this convention', it would include the duty to protect UCH provided for in article 303(1) thus not only granting the coastal State the right to regulate such activities, but also the duty to do so. It is also argued that even though UCH may not be regarded as natural resources, the words, "such as" which refer to "the production of energy from water, currents and winds", do not exhaust all of the examples of "other activities for economic exploitation and exploration of the zone" and treasure hunting and economic salvage activities can be construed as "other activities".[141] There is, however, little State practise to support the argument that the coastal State can regulate UCH in the EEZ, except that of Jamaica and Morocco[142].

As article 58 expressly preserves the freedom of the high seas as laid down in article 87, and applies the provisions of articles 88 to 115 relating to the high seas to the EEZ, it would appear that activities directed at UCH could still fall within these freedoms. Some commentators have therefore concluded that activities directed at UCH continue

---

[137] Article 69

[138] Article 70

[139] Article 59 provides that; "[i]n cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal state and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole".

[140] This includes Zhao *op.cit* p..316 and Alexander *op.cit* p. 9. Alexander argues that "a coastal nation's sovereign rights to control economic exploitation of its EEZ is not limited to natural resources".

[141] As Zhao also regards underwater archaeology as a form of MSR he argues that article 246(1), which declares that the "coastal state, in the exercise of jurisdiction, have the right to regulate, authorise and conduct scientific research in their exclusive economic zone...", would therefor include the right to regulate and authorise underwater archaeology in the EEZ. This rights would, however, be limited to the regulation and authorisation of underwater archaeology as a form of MSR. If an activity directed at UCH was not done in accordance with current archaeological practises, but rather in accordance with admiralty salvage law, it could be argued that that particular activity does not constitute underwater archaeology and therefore not subject to coastal State regulation. Thus, archaeological expedition could be regulated, but not salvage expeditions. This obviously is not a satisfactory position. Zhao *op.cit* p.316

[142] Moroccan Decree no.181179 of 8 April 1981 and Jamaican Exclusive Economic Zone Act 33 of 1991

to be a freedom of the high seas according to article 58[143]. Any attempted extension of coastal States' rights may be viewed as amounting to 'creeping jurisdiction' and perhaps an attempt to assimilate the territorial sea and the EEZ.

It has been argued that activities directed at UCH in the EEZ have not been reserved either to the coastal State or to any other States under the freedom of the high seas and must therefore be determined in accordance with article 59.[144] Should a dispute therefore arise between a coastal State and another State undertaking archaeological research or recovery, it must be resolved between the two States on the basis of equity and taking into account the interests of the international community and other relevant circumstances.[145]

The proposed jurisdictional regime for the CS and EEZ

The ILA draft convention proposed the creation of a cultural heritage zone coextensive with the CS[146]. This would have satisfied both the original proposal of Greece during UNCLOS III and Recommendation 848. There were, however, serious reservations concerning this zone and it was criticised as amounting to creeping jurisdiction and a threat to the delicate balance that was established in the maritime zones created by UNCLOS.[147]

In the face of such opposition to the creation of a new maritime zone not provided for in UNCLOS, UNESCO adopted an alternative approach to the extension of coastal States' rights in respect of the preservation of UCH situated beyond a coastal State's territorial sea. The ILA, aware of the opposition to the proposal of a cultural heritage zone, suggested that UCH situated on a coastal State's CS could be made to fall within the coastal State's jurisdiction by redefining the coastal State's rights to the CS and EEZ in UNCLOS[148]. Instead of referring to a new zone, the UNESCO draft would "speak rather of the rights and duties of states beyond the territorial waters and of jurisdiction implying potential control but not control itself."[149] This would conform to Germany's proposal that instead of creating a new maritime zone, "thought should be given to the matter of whether the objectives of the UNESCO draft could also be achieved by complementing the existing provisions of the Convention, perhaps by describing in greater detail the sovereign rights in the EEZ"[150].

Article 5 of the secretariat draft, headed "Underwater Cultural Heritage in the Exclusive Economic Zone and the Continental Shelf" stated that;

"1. State Parties shall require the notification of any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf.

---

[143] Oxman *op.cit* p.369
[144] Allen *op.cit* p.30
[145] For a more detailed discussion of article 59, see Strati *op.cit* pp.265 - 266; pp.268-269
[146] This could result in a zone anything up to 350 nm from the coastal State baseline according to article 76 of UNCLOS. For a discussion on the extent of a coastal State's CS, and the ability to determine whether a wreck in fact lies on the CS as defined in UNCLOS, see Ruffman, A., Gault, I.T., and VanderZwaag, D., "Legal Jurisdiction Over the Titanic" 37 *Lighthouse* Spring (1988) pp.23-39
[147] Doc. 28C/39, Paris, 31 October 1995 . See Appendix VI for examples of State comments regarding this cultural heritage zone.
[148] O'Keefe (1996) *op.cit* p.171
[149] Doc. 29C/22 ,Paris, August 1997, Annex I p.7; CLT-96/CONF.605/6 Paris, May 1996 p.10
[150] Doc. 29C/22, Paris, August 1997, Annex II p.4

2. State Parties may regulate and authorise all activities affecting underwater cultural heritage in the exclusive economic zone and on the continental shelf, in accordance with this Convention and other rules of international law.

3. In authorising any such activities, State Parties shall require, at a minimum, with the operative provisions of the Charter, in particular taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education.

4. State Parties may deny authorisation for the conduct of activities affecting underwater cultural heritage having the effect of unjustifiably interfering with the exploration or exploitation of their natural resources, whether living or not living.

5. State Parties shall make punishable all breaches of the terms of permits authorising the conduct of activities affecting underwater cultural heritage."

The extension of coastal State jurisdiction in accordance with article 5 has been the most controversial aspect of the UNESCO draft convention as it provides for coastal State rights and duties not provided for under UNCLOS. Substantive discussions of the preservation regime for UCH in the EEZ and CS have been overshadowed with concerns regarding the existing UNCLOS regime and the extent to which UNESCO may conflict with this regime. Although article 5 does create rights and duties for the coastal State not contained in UNCLOS, it is uncertain whether the extension of these rights and duties is justified in international law.

Article 5 introduces a new regime in regards to the coastal States' jurisdiction over UCH. Article 5(1) introduces a mandatory reporting requirement for the finding of any UCH, which would necessitate the establishment of an administrative infrastructure[151]. The value of this obligation will depend to a large extent on whether the coastal State has exercised the discretionary right to extend its jurisdiction over UCH the EEZ and CS as provided for in article 5(2). States party to this convention are not required to regulate recovery operation in the EEZ or CS, but may chose do so. As some coastal States will not have declared an EEZ, nor may they have the infrastructure to regulate recovery operations so distant from their shores, it should not be mandatory, and a coastal State may rely on article 6, 7 and 9 to provide a measure of preservation for UCH which may lie on its EEZ or CS. The discretionary right to extend its regulatory jurisdiction under article 5(2) is however, qualified by the requirement that such extension is undertaken " in accordance with this Convention and other rules of international law." It is the use of this phrase that has caused a great deal of uncertainty as to its interpretation and led to the alternative proposals considered below.

If a coastal State does exercise the discretion to regulate and authorise activities directed at UCH, then it is bound to apply, as a minimum, the Rules in the Annex. This mandatory requirement is precisely the reason for the extension of jurisdiction and should therefore be strictly applied. Article 5(3) goes on to list a number of rules in the Annex which, in particular, should be applied. This is unfortunate as it may appear to elevate these provisions above the remainder. As the entire Annex is to be applied, it is submitted that these particular rules should be omitted.

[151] As article 5(1) requires the notification of any discovery of UCH on the CS to the coastal State, it is therefore envisaged that the coastal State would neither require consent to be given prior to a search, nor have the right to participate in such a search. If, however, the search for UCH could be regarded as an aspect of marine scientific research, then the coastal State could rely on articles 246(2) to require consent for such search activities and on article 249(1) to participate in this research.

Article 5(4) allows the coastal State to deny authorisation for the conduct of activities affecting the UCH having the effect of interfering with the exploration and exploitation of the natural resources of the EEZ and CS. It may therefore be that a State can deny authorisation to undertake recovery operation if this operation will interfere with existing rights of exploration and exploitation. A conflict may develop where, in the exercise of its rights to exploit the mineral resources of the CS, a State is required to destroy or damage UCH. If emergency recovery operations will hamper the exploitation activities, a State may deny authorisation to recover the UCH. This article therefore holds the existing rights of the coastal State, as recognised in article 56 of UNCLOS, on a higher plane than any rights to UCH[152]. In this way, the coastal State is able to ensure that the rights under UNCLOS are to take precedence. This has the effect of altering the balance of residual rights in the EEZ as a *sui generis* zone. As article 58 of UNCLOS does not include the freedom to conduct archaeological research or recovery, the right to conduct such activities would have been determined under article 59. Should a dispute therefore have arisen between a coastal State and another State undertaking archaeological research or recovery, the dispute would have been resolved between the two States on the basis of equity, taking into account other relevant circumstances, and the interests of the international community. The UNESCO draft would alter this dispute settlement mechanism and have the effect of giving the coastal State the right to unilaterally determine whether the act of another State undertaking activities directed at UCH has interfered with the coastal State's rights under article 56 of UNCLOS, subject only to the determination that such an interference must have been unreasonable. This result might suggest that the regime created under UNCLOS has been changed, and that article 5 is therefore not in conformity with UNCLOS, and in fact contradicts its provisions. However, it is submitted that neither articles 56 nor 58 should be interpreted as exhaustive. Similarly, the rights or duties which may be the subject of an article 59 settlement should not be regarded as being incapable of assigned to either the coastal or flag State.

This however, would be limited to activities that are directed at UCH, meaning activities which "may, directly or indirectly, physically disturb or otherwise damage" UCH.[153] The search for UCH using remote sensing techniques will therefore be excluded and so the right to undertake the search for UCH which interferes with the coastal State's exploration or exploitation of the natural resources of the EEZ, whether living or non-living will continue to be determined in relation to article 59 of UNCLOS. As article 5(1) of the UNESCO draft convention stipulates that the coastal State has the right to be informed of any discovery of any UCH in its EEZ, it would appear that the search for such UCH without the coastal State's consent is envisaged.

In terms of the CS, the UNESCO draft will radically alter the existing rights and duties of the coastal State originating from the 1958 Convention[154]. The recovery of UCH on the CS will no longer be regarded as a freedom of the high seas, as the coastal State will have the right to authorise and regulate all activities directed at the UCH in these areas.

---

[152] Some States have continued to make proposals that would ensure the primacy of the coastal State's right and duties in the EEZ and CS over the right of other States to recover UCH in its EEZ or CS . This includes the US, which proposed that article 5(2) of option 2 read as follows, "States parties may refuse to issue permits or otherwise prohibit the conduct of activities directed at underwater cultural heritage having the effect of unjustifiably interfering with the exercise of their sovereignty and jurisdiction in their exclusive economic zones and on their continental shelf in accordance with international law, including the United Nations Convention on the Law of the Sea" WG.1/WP.19, Paris, 5 July 2000; CLT-2000/CONF.201/9, Paris, 7 July 2000.

[153] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.3

[154] The Geneva Convention on the Continental Shelf 499 U.N.T.S 311

As article 3 of the Geneva Convention stipulates that the coastal State's rights to the CS do not effect the legal status of the waters super-adjacent to the CS as the high seas, article 5 of the UNESCO draft convention will not effect the freedom to search for UCH on the coastal State's CS. This is exemplified in articles 5(2)-(4) of the UNESCO draft convention that refers to all activities directed at the UCH. As article 5(1) stipulates that the coastal State has the right to be informed of any discovery of any UCH on its CS, it would appear that the search for such UCH without the coastal states consent is envisaged[155].

The effect of the UNESCO draft convention on UNCLOS would be very similar to that on the Geneva convention. Granting coastal States' rights to regulate and authorise activities on the CS would extensively alter the extent of coastal Sate jurisdiction. It would therefore no longer be necessary for a coastal State to rely on its competence to regulate the exploration and exploitation of the natural resources of the CS, or to regulate the construction and use of installations to impose *de facto* control on activities directed at UCH. These new coastal State rights with regard to UCH will amount to a new limitation on the freedom of the high seas, to which certain maritime nations, particularly the US, object. The search for UCH on the CS would remain a freedom of the high seas in terms of the UNCLOS regime, as it did under the Geneva Convention regime.

Alternative proposals for article 5

The response from States to article 5 has been varied, encompassing both the view that it is insufficient to preserve UCH on the EEZ or CS or that it has gone to far and amounts to an alteration of the substantive provision of UNCLOS. Protracted negotiations at the 1998, 1999 and 2000 meeting of experts did not resolve the conflict, and in the negotiating draft three alternatives were proposed to replace article 5. These are now considered.

Option 1

The use of the phrase "in accordance with this Convention and other rules of international law" to qualify the extension of jurisdiction in article 5(2) is problematic. Clearly, article 5 allows for the exercise of coastal State jurisdiction not provided for in UNCLOS. It would therefore be illogical for this phrase to be interpreted as requiring article 5 not to add to the jurisdictional regime under UNCLOS. It must therefore be interpreted as requiring the provision of article 5(2) not to contradict any existing provisions of UNCLOS, which it does not necessarily do[156]. This approach has been adopted by a number of States, including Australia and Italy, which have supported article 5 in principle, but proposed a revised version which is based on the same presumptions as that of article 5.

[155] A number of States already require notification of finds on the CS or EEZ, such as Denmark, Norway, Netherlands and US. CLT-96/CONF.202/5 Paris April 1998 p.11

[156] Poland, for example, argues that the granting of regulatory jurisdiction over UCH on its EEZ or CS would be wholly consistent with the provisions and intent of article 56 of UNCLOS, and such an extension would not, therefore contravene the provisions of UNCLOS. Statement concerning the protection of UCH within the EEZ produced at the 2000 meeting.

This option reads as follows;

"Article 5: Underwater Cultural Heritage in the Exclusive Economic Zone and the Continental Shelf

1. State Parties shall require that any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf[157] be reported to their[158] competent authorities.

2. State Parties may regulate[159] [activities directed at] underwater cultural heritage in their exclusive economic zone and on their continental shelf.[160]. In doing so, State Parties shall require compliance, at a minimum, with the rules of the Annex[161], in particular taking into account the needs of conservation and research.[162]

3. State Parties may deny the conduct of [activities directed at] underwater cultural heritage having the effect of [unjustifiably] [interfering with the exploration or exploitation of their natural resources, whether living or not living and with other rights or jurisdiction which they enjoy under the United Nations Convention of the Law of the Sea in these Areas.][163]

4. State Parties may enter into regional or bi-lateral agreement or develop existing agreements for the preservation of the[164] common cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States *of cultural origin* and States of historical and archaeological origin]".[165]

Although this version of article 5 has yet to be definitively drafted, as is evident from the square brackets, it does represent the views of those States which regard the extension of coastal State jurisdiction to regulate the recovery of UCH in the EEZ and CS to be an exercise in conformity with UNCLOS.

Although subsections 1-3 have undergone some amendment, they do not substantially alter the regime suggested in the original version of article 5. However, three of the amendments should be noted. Firstly, the introduction of a paragraph specifically encouraging the formation of regional or bi-lateral agreements as an aspect of the article relating to the EEZ and CS is important. In part, this may be as a realisation of a number

---

[157] During the working group to discuss article 4-7 of the first UNESCO draft at the 1999 meeting of experts, a previous version of this option had contained the word 'shall' after 'continental shelf'. This deletion would appear to be a drafting exercise as the mandatory nature of the requirement had already been imposed by the previous 'shall' after 'State Parties'.

[158] The word 'their' was introduced to replaced 'the' in the original version of article 5 to indicate that it is the competent authorities of the coastal State to which notice of a find must be given rather than the competent authority of the State of the national or vessel discovering the UCH.

[159] The phrase "and authorise" has been omitted from this version of article 5. It is uncertain what effect this might have on the coastal States authority, particularly in light of article 8 which allows the coastal State to issue permits for the recovery of UCH on the EEZ or CS. It is submitted, however, that 'to authorise' would fall within the scope of the term *'regulate' and the omittance* would therefore not alter the scope of the coastal States jurisdiction as contained in the original version of article 5.

[160] As the phrase "in accordance with this Convention and other rules of international law" had been difficult to define, and had raised many of the jurisdictional issues concerning conformity with UNCLOS, it has been deleted in this option.

[161] Replaces "operative provisions of the Charter".

[162] The remainder of the original paragraph of article 5, which read, "including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education." has been deleted. It is submitted that the phrase "in particular taking into account the needs of conservation and research' should also be deleted.

[163] Possible deletion so as not to limit these rights under UNCLOS. i.e. more rights that these need to be taken into account.

[164] The word 'the' was introduced to replace the word 'their' as the latter term reflected a narrow, regional cultural heritage whilst the draft should be able to preserve universal cultural heritage.

[165] This last paragraph is a new addition to article 5 and is partly as result of the insistence of a number of States, particularly Spain, on the need for co-operation with States of origin, particular when found in the territorial waters of another State.

of State, which are highly committed to preserving UCH, that the provisions of a negotiated universal convention will contain a minimum standard of protection. This new provision will therefore allow for stricter regional protection[166]. Secondly, the use of the term 'unjustifiably' to limit the extent to which the coastal State can prohibit activities directed at UCH which may interfere with its rights and duties delineated under UNCLOS has been questioned, and placed in square brackets; emphasising the delicate balance that may exist between EEZ related UNCLOS rights and any new powers that might be conferred on the coastal State. Thirdly, the last paragraph of the original article 5 has been deleted. It had read " State Parties shall make punishable all breaches of the terms of permits authorising the conduct of activities affecting underwater cultural heritage." This deletion reflects the contentious issues of permits and sanctions[167].

Option 2 [168]

Article 5(2) authorises the coastal State to regulate all activities directed at UCH in the EEZ and CS in accordance with all existing rules of international law, including UNCLOS. From the negotiating history of article 303 of UNCLOS, it is quite clear that many States (most notably the US) were opposed to the extension of coastal State jurisdiction in relation to UCH found in these zones. Article 5, it is argue, will have the effect of reversing this negotiated outcome and reverting to the initial proposal made by the Greek delegation to UNCLOS III in 1979.[169] Thus, the coastal State jurisdiction over the EEZ will no longer be limited to those contained in article 56.

A number of States have therefore argued that any new convention must be in conformity with UNCLOS. By this, it is meant that the provisions of the UNESCO draft must neither contradict the jurisdictional regime nor add any new rights and duties to existing jurisdictions. Any new addition would be viewed as a dangerous precedent amounting to 'creeping jurisdiction' and perhaps an attempt to assimilate the territorial sea and the EEZ or CS. The second option to article 5 was therefore proposed in order to limit coastal State jurisdiction to regulate activities directed at UCH in the maritime zones which had been catered for in UNCLOS, namely the territorial sea and CZ. Beyond these maritime zones, no coastal State jurisdiction would exist, though some measure of preservation and regulation could exist through the use of national and flag State jurisdiction.

Option 3

During the negotiations in 1999, it became apparent that the States that had proposed option 1 and 2 of article 5 were reluctant to concede any ground. The US delegation, in particular, was adamant that it would not become party to any convention that extended coastal State jurisdiction. It was also suggested that unless the developed maritime nations, such as the US, were party to a convention, it would be wholly ineffective as a means to preserving UCH in international waters. They went on to state that if article 5

---

[166] See chapter 3

[167] See chapter 3

[168] Article 5, option 2 reads; "[i]n the exercise of their sovereign rights in the exclusive economic zone and on the continental shelf, as provided for in the UN Convention on the Law of the Sea, State Parties shall take account of the need to protect underwater cultural heritage in accordance with this convention." (CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.6). This provision was originally proposed by the UK. With the support of the US and Norway, the UK wording was retained in the second option. (1999 meeting)

[169] C.2/Informal Meeting/43, 16 August 1979

could not obtain broad consensus, it could not possibly be a basis for a convention. On the other hand, Australia, having already extended its jurisdiction to regulate activities directed at UCH on the CS, was adamant that, without this extension of jurisdiction, the provisions of the convention would not provide an adequate preservation regime.

The Chairperson of the working group, in a spirit of compromise, therefore attempted to assimilate options 1 and 2 and proposed a third option for article 5[170]. While this was intended to be a compromise solution, it has received little support from States.[171]

Nationality principle of jurisdiction

In areas beyond coastal States' jurisdiction, no State has exclusive jurisdiction, other than jurisdiction over its nationals and vessels flying its flag[172]. The principle, of the freedom of the high seas is said to apply.

Freedom of the High Seas

Article 1 of the Geneva Convention on the High Seas[173] states that the high seas are open to all nations and that the freedom includes that of navigation, fishing, overflight, laying of submarine cables and pipelines and any other freedoms "recognised by the general principles of international law." These freedoms are only limited in that they may be exercised only as long as they do not adversely affect the use of the high sea by other States. Strati argues that underwater archaeology constitutes a freedom of the high sea in its own right, distinct from both traditional salvage law or MSR[174]. Arend[175] and Dromgoole[176], on the other hand, regard archaeological research or recovery as scientific research, and therefore a freedom of the high seas under that head. Whichever stance is taken in this regard, it is clearly regarded as a freedom of the high seas, and States

---

[170] Article 5, option 3 read; "(1) A State Party shall be notified of any activity or discovery relating to underwater cultural heritage occurring in its exclusive economic zone or on its continental shelf.[Such notification shall be transmitted to the Director-General of UNESCO]. (2)Such State Party shall take appropriate measures for the assessment and registration of that information. (3) States shall, where appropriate, exchange this information with the competent authorities of other States, in particular the State whose nationals reported the discovery. (4) States may authorise protective interventions and scientific research of the discovered underwater cultural heritage. To this end they shall consult the competent authorities of a State whose national or vessels flying it flag intend to engage in such activity and shall ensure that such activity; (a) complies, at a minimum, with the rules of the Annex; (b) involves the participation of competent experts of the State Party in whose exclusive economic zone or on those continental shelf the discovered underwater cultural heritage is located. (5) State Parties shall prohibit; (a) any activity [directed at] underwater cultural heritage which is in violation of paragraph 1,2,3 and 4; or (b) the use of its territory, including its maritime ports and off-shore terminals, or other areas under its jurisdiction such as the continental shelf or exclusive economic zone, in support of any activity [directed at] underwater cultural heritage which is in violation of paragraphs 1,2,3 and 4".CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.7

[171] Both UK and Australia would not support this option, though Uruguay did go on record as supporting it. CLT-2000/CONF.201/3, Paris, April 2000 p.12

[172] Akehusrt states that "a State has an unlimited right to base jurisdiction on the nationality of the accused." See Akehurst, M., "Jurisdiction in International Law" 46 *British Yearbook of International Law* (1974) p.156

[173] 450 U.N.T.S. 11 (1958)

[174] Strati *op.cit* p.217

[175] Arend *op.cit* p.786

[176] Dromgoole. S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage in the United Kingdom* (1993) Unpublished PhD Thesis, University of Southampton, p.4-28

[177] Oxman *op.cit* p.353; Strati *op.cit* p.224

undertaking such activities are only bound by the international rules relating to salvage and ownership of UCH.

The legal regime of the high seas under UNCLOS, though geographically reduced by the introduction of the EEZ, has changed little from the 1958 Geneva Convention. Thus, the extent to which activities directed at UCH were regarded as a freedom of the high seas under the 1958 Convention, will continue to apply under the new regime[177]. Article 87 is very similar to article 2 of the 1958 Convention, though it does introduce two more specific freedoms of the high seas, namely, "the freedom to construct artificial islands and other installations permitted under international law" and "the freedom of scientific research".

If article 303 can be interpreted to apply to the high seas, then States have a general duty to preserve UCH found at sea and to co-operate for this purpose. However, as no State can subject any part of the high seas to its jurisdiction[178], the effect will be that the extent of State's compliance with this obligation will apply only to ships flying its flag or its nationals. As this duty is not defined in any way in the convention, the extent to which States interpret this duty in the high seas is indeterminable.

The nationality principle and the UNESCO draft convention

Article 89 of UNCLOS states that, "no State may validly purport to subject any part of the high seas to its sovereignty." Thus, the territorial principle of jurisdiction cannot apply in this area. Similarly, in the case of the EEZ, as the coastal State has no explicit jurisdiction to regulate activities directed at UCH, the territorial principle of jurisdiction cannot be applied. In order to establish a preservation regime for UCH found in this area, the ILA and UNESCO have made use of the nationality principle of jurisdiction in article 7, which is headed 'Prohibition of Certain Activities by Nationals and Ships'[179]. Article 7 of the secretariat draft states;

"1. A State Party shall take all such measures as may be necessary to ensure that its national and vessels flying its flag[180] do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the principles of the Charter.

2. Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include, among others, the establishment of regulations;

(a) to prohibit activities affecting underwater cultural heritage in areas where no State Party exercises its jurisdiction under Article 5 otherwise than in accordance with the terms and condition of a permit or authorisation granted in compliance with the provisions of the Charter;

(b) to ensure that they do not engage in activities affecting underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises its jurisdiction under article 5, in a manner contrary to the laws and regulations of that State".

UNESCO has considered this article to be the second 'core' provision in the convention[181]. Although articles 6 and 7 provide a measure of preservation, it is the right

[178] See also article 241 and Strati *op.cit* p.240

[179] Spain did propose that the heading of this article be broadened to include the word "regulation" so as to read "Regulation and prohibition of certain activities regarding nationals and ships" CLT-2000/CONF.201/3, Paris, April 2000 p.12

[180] Article 91 of UNCLOS specifies the condition for the nationality of a vessel, while article 92 requires each vessel to have only one nationality

[181] Article 5 is considered to be the most important 'core' provision in the draft convention in preserving UCH beyond the limits of national jurisdiction.

to regulate recovery operations in these zones that is considered to provide the greatest measure of preservation. Once again, the scope of application of this article will depend on the outcome of negotiations on article 5 and the ability of the coastal State to extend its regulatory jurisdiction over the EEZ and CS. Thus, various options have been proposed which will take into account different areas of coastal State jurisdiction[182].

Article 7(1) has been the subject of some debate. During the 1999 meeting of experts, a number of States questioned the ability of a State to exercise effective jurisdiction over its nationals, and proposed that the jurisdiction be limited to State's flag vessels[183]. Australia, for example, considered the jurisdiction over a State's nationals to be too onerous a burden on the State and a duty that would not provide an effective tool for the preservation of UCH. Canada and Italy, proposed that a distinction be made between a State's duty to ensure that its flag vessels undertake activities directed at UCH and similar activities by its nationals. While flag vessels would require a permit prior to undertaking any activities directed at UCH, the State would simply be required to take measures making it an offence for its nationals to engage in illicit activities[184]. This is a sensible proposal as it distinguishes between two situations where the State may have different levels of control. The State can therefore undertake more stringent duties in the case of vessels flying its flag, whilst still being able to undertake a duty with regard to its nationals which is realistically enforceable. The extent of the State's duty has also been questioned, with option 1 of article 7 referring to "all practical measures" rather than "all measures that may be necessary", while option 2 of article 7 only refers to a requirement to report discoveries of UCH found in the EEZ or on the CS[185]. The latter is a result of the opposition to the extension of coastal State jurisdiction over the EEZ and CS. It has therefore been proposed that the nationality principle should apply in cases of activities directed at UCH situated in any State's EEZ or CS. Thus, the coastal State would have no jurisdiction over these activities in the EEZ and CS. However, it was recognised that the coastal State should at least be informed that UCH had been located in these areas, particularly if the activities directed at UCH may interfere with the coastal State's rights and duties in the EEZ or CS as contained in UNCLOS. While this reporting requirement is to be welcomed, and will complement article 13 on information sharing, it is unfortunate that the phrase "or the State of origin, or the State of cultural origin, or the State of historical and archaeological origin" was added on to the end of

[182] The UK proposed the following article as an alternative to Article 7; "State Parties shall require that any discovery relating to underwater cultural heritage by their nationals or through the activities of vessels flying their flag in the exclusive economic zone or the continental shelf of another state be reported to the competent authorities of that state." The Chairperson of working group 3, established to discuss article 4-7, proposed the following as an alternative and compromise to previous versions of article 7; "All State Party shall take all practical measures to ensure [that their national] and vessels flying their flag do not engage in any [activity directed at] underwater cultural heritage in a manner inconsistent with this convention and its Annex, or the laws and regulations of the State Party in whose exclusive economic zone or on whose continental shelf such underwater cultural heritage is located, as appropriate. (1999 meeting).

[183] This included Australia, France and India. (1999 meeting)

[184] CLT-2000/CONF.201/3, Paris, April 2000 p.10

[185] Article 7, option 1 reads; "1. State Parties shall take all practical measures to ensure that [their nationals and] vessels flying their flag refrain from engaging in any [activity directed at] underwater cultural heritage in a manner inconsistent with the Rules in the Annex.", while article 7, option 2 reads; "State Parties shall require that any discovery relating to underwater cultural heritage by their nationals or through activities of vessels flying their flag in the exclusive economic zone or the continental shelf of another State be reported to the competent authorities of that State or the State of origin or the State of cultural origin, or the State of historical and archaeological origin." CLT-96/CONF.202/5 Rev.2, Paris, July 1999 pp.5-6.

article 7(1) of option 2. This only goes to perpetuate the interpretative problems associated with the wording that exists in article 149 of UNCLOS.[186]

Article 7(2) has also been subject to alternative proposals[187]. It was suggested that the term 'jurisdiction' be replaced with the term 'control' in order to subvert the suggestion of 'creeping' jurisdiction as indicated by the reference to jurisdiction exercised in accordance with article 5 in article 7(2). The existence of article 7(2) itself has been criticised since it adds little to the convention as the principle of jurisdiction laid out in previous articles of the draft would account for the jurisdiction contained in this article.

Article 7(2)(b) of option 1 requires a State to take all practical measures to ensure that its nationals do not engage in any activities directed at UCH in another State's EEZ or CS in a manner which contravenes the other State's national laws. A previous version of this article had proposed the phrase 'in accordance with the operative provisions of the Charter', (which, in accordance with the introduction of the Annex, could be read as ' in accordance with the Rules in the Annex'), rather than "in a manner contrary to the laws and regulations of that State'[188]. The former phrase would require a State to ensure that any nationals or flag vessel engaged in activities directed at UCH do so in accordance with the operative provisions of the Annex. This terminology would be consistent with that which applies under articles 4 and 5, as is retained in article 7(2)(b) option 2. However, the latter phrase would require a State to ensure that their nationals complied with the national laws of another State. No State is likely to agree to such an arrangement. Though these national laws would encapsulate a requirement that the Rules of the Annex are applied, these would only apply as a minimum standard. It may therefore be that a State is required to ensure that its nationals or flag vessels comply with laws of another State's in that State's EEZ or CS, which may be more onerous than may apply in its own EEZ or CS. This would appear to be an unsatisfactory position, and the former phrase would therefore seem preferable. In essence, article 7 provides for a form of jurisdiction acceptable to most States and has long been acceptable in international maritime law[189]. Essentially, this jurisdiction will apply to areas beyond the coastal States jurisdiction, whatever may be decided. Whatever the result of the deliberations concerning the extension of this functional jurisdiction in the EEZ and CS, it would not extend to cover the Area, which will therefore remain subject to the nationality principle of jurisdiction.

---

[186] The phrase "or the State of origin, or the State of cultural origin, or the State of historical and archaeological origin" was added to the final version of the working paper for working group 3, 1999 meeting. See further chapter 3.

[187] Argentina has questioned whether article 7(2) is necessary at all.

[188] The previous version of article 7 read; "1. A State Party shall take all practical measures ensure that their national and vessels flying their flag refrain from engaging in any [activity directed at] underwater cultural heritage in a manner inconsistent with the [principles of the Charter]. [2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include, among others, the establishment of regulations; (a) to prohibit [activities directed at] underwater cultural heritage in areas where no State Party exercises control under Article 5(2) otherwise than in accordance with the terms and condition of a permit or authorisation granted in compliance with the [provisions of the Charter.
(b) to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises control under article 5(2), in a manner contrary *to the [operative provisions of the Charter]*. (Own emphasis).

[189] Japan commented that it regards this article (and the similar version in options 2 and 3) as contrary to the jurisdiction conferred by UNCLOS. CLT-2000/CONF.201/3, Paris, April 2000 p.10

The Area

Since the ability to reach and recovery UCH from the deep seabed was not available during the negotiation on the Geneva Convention on the High Seas[190], it was not addressed, and under the resulting scheme, archaeological research and recovery on the deep seabed can be recognised as a legitimate exercise of the freedom of the high seas.

In term of UNCLOS, UCH found in the Area[191] are governed by both article 149 and article 303(1),(3) and (4). However, as discussed above, article 149 is of limited practical importance given its limited scope, vagueness and unlimited variations in interpretation. The 1994 Agreement relating to the Implementation of Part XI has no effect on article 149. For all intents and purposes, the search for and recovery of UCH found on or under the deep seabed is an exercise of the principle of the freedom of the high seas. This freedom is, however, subject to the duties detailed in article 303(1) and to the rights of owners, salvors and with respect to cultural exchanges.[192]

An important doctrinal innovation in the regime of the Area is the recognition of the Area and its resources as the common heritage of mankind.[193] This principle is found in the section entitled "Principles Governing the Area", as is article 149, which might suggest that these principles are to be read in parallel. This however, is insufficient in itself to stand as a basis for declaring this principle applicable to UCH found in the Area. The concept of the common heritage of mankind was introduced with specific reference to the deep seabed mining regime, and it has been argued that it nothing in the convention suggests that it should apply to any other aspect of the convention[194]. Conversely, however, there is nothing in the convention to suggest that UCH should not be governed by this concept. Thus the application of this concept to UCH may arise through progressive development and State practise. It may also be that the application of the concept of the common heritage of mankind to UCH is supported by its emergence in cultural heritage law rather than in development in the contemporary law of the sea.

The only article of the UNESCO draft convention to specifically deal with UCH in the Area, is article 7bis[195], which concerns the duty to report any discovery of UCH to the ISBA. The jurisdictional principle applicable will therefore be that envisaged in article 7. As the substance of this article concerns the duty to report finds, it is best dealt with under the section on international co-operation[196].

---

[190] *450 U.N.T.S. 11 (1958)*

[191] The Area id defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" Article 1(1) UNCLOS

[192] *Article 303(3) of UNCLOS*

[193] Article 136 of UNCLOS

[194] Oxman *op.cit* p.361

[195] An alternative is provided in option3, designated as article 7. CLT-96/CONF.202/5 Rev.2, Paris, July 1999 pp.8-9.

[196] See chapter 3

The relationship between the UNESCO draft convention and the 1982 United Nations Convention on the Law of the Sea

Introduction

It is clear from the above discussion that UNCLOS does not provide an adequate preservation regime for UCH and that a new regime is necessary. It is also clear that the regime proposed in the UNESCO draft convention will alter the rights and duties of States in the various maritime zones established under UNCLOS. What is not, however, clear, is how the old and newly proposed regimes are to be reconciled.

Arguably the most controversial paragraph in the preamble to the UNESCO draft convention relates to the way in which this convention is to interact with other international conventions, particularly UNCLOS. The paragraph reads;

"Realising the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the United Nations Convention on the Law of the Sea of 10 December 1982"[197]

The interpretation and effect of this paragraph has been the subject of protracted negotiations at the meeting of experts and has resulted in the emphasis of the negotiations shifting from cultural heritage issues to law of the sea issues. In particular the jurisdictional problems associated with the relationship between the UNESCO convention and UNCLOS has needed close examination.

The improvement of the UNCLOS regime to preserve underwater cultural heritage

The UNESCO draft convention will have the effect of introducing coastal States rights that were not contained in UNCLOS. Some of these rights had been the subject of protracted negotiations at UNCLOS III, but had been rejected during the process of reaching a balance of rights and duties acceptable to as many participants as possible. Change in any legal system is, however, inevitable, and it may be that the UNESCO draft convention is capable of introducing changes to the contemporary law of the sea. The uncertainties concerning the preservation of UCH have not been the only area in which UNCLOS has been regarded as inadequate, and for which further negotiations and agreements have been necessary. The controversy concerning the deep seabed mining regime and the vagueness of the provisions concerning highly migratory fish stocks have necessitated renegotiations and the implementation of new agreements to supplement UNCLOS. It may therefore be instructive to consider the manner in which these issues were handled and consider whether the same may be considered for the preservation of UCH under the UNCLOS regime.

Amendment of UNCLOS

Clearly the most appropriate manner in which to ensure that an agreement is capable of meeting contemporary challenges is to alter its substantive terms. Articles 312 and 313 of UNCLOS stipulate the mechanism for its amendment. In terms of article 312, a State Party may propose an amendment to the provision of UNCLOS, other than to those

[197] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.2

provisions relating to activities in the Area[198], only after 10 years from the coming into force of the convention[199]. The Secretary-General of the UN will convene a conference to consider proposed amendments only if more than one half of the State Parties to UNCLOS consent to such a conference within 12 months of the Secretary-General having informed all State Parties of the proposed amendments. Article 313, however, contains an alternative procedure for the amendment of UNCLOS. A State Party may, by written communication to the Secretary-General of the UN, propose an amendment to UNCLOS[200], to be adopted by a simplified procedure which does not entail the convening of a conference. In terms of this procedure, the Secretary-General shall communicate the proposed amendment to all State Parties. If, within 12 months of having made this communication, a State Party objects to the proposal or to the simplified procedure, the proposal shall be rejected, and any further amendment would have to be in accordance with article 312. If, however, no State Party objects to the amendment, then the amendment will be adopted, and binding on all State Parties. Quite clearly, any attempt to alter the substantive provisions of UNCLOS would not be possible at this stage, though possible in 2004 if the political will to do so exists.

Implementation agreements

In light of these difficulties in amending the substantive provisions of UNCLOS, alternative mechanisms have been adopted.

(i) 1994 Implementation Agreement Regarding Part XI of UNCLOS

The creation of a deep seabed-mining regime under UNCLOS was arguably the most contentious issue to arise during negotiations at UNCLOS III. The resulting Part XI of UNCLOS was declared unsatisfactory by the US, which subsequently voted against the adoption of the Convention. In 1989, at the end of a Preparatory Commission for the International Seabed Authority meeting, the Group of 77 suggested that it would consider addressing the concerns of the industrialised nations in an attempt to obtain consensus regarding Part XI, which resulted in the Secretary-General of the UN initiating a consultation process in order to promote universal participation in UNCLOS. Contentious issues included the creation and function of the Enterprise, the establishment of rules for decision making, particularly in the Council and the regulations for the transfer of technology. In particular those measures that required States to contribute to the financial burden of the ISBA needed urgent reconsideration. During the consultation on Part XI, Guyana deposited its ratification of UNCLOS, which, as the 60th instrument of ratification triggered article 308 of UNCLOS, which would bring the Convention into force 12 months later, on the 16 November 1994. With the impending implementation of UNCLOS, the consultations regarding Part XI became more urgent. The consulting parties were finally able to reach consensus on the Implementation of Part XI of UNCLOS, which was adopted by the General Assembly on 28 July 1994 and came into effect on the 28 July 1996.

During these consultations on the implementation of Part XI, any attempt to "amend" or "replace" terms of Part XI of UNCLOS was strongly resisted by many nations, particularly those who had only recently ratified UNCLOS, and had implemented

[198] Amendment to the provision of UNCLOS relating exclusively to activities in the Area is governed by article 314 of UNCLOS.
[199] Which would therefore be on 16 November 2004
[200] Other than to those provisions relating to activities in the Area.

national legislation to give effect to their ratification[201]. Instead of amending those provisions of UNCLOS which hindered the possibility of agreeing on the implementation of Part XI, it was agreed to 'disapply' certain provisions, such as paragraphs 1,3 and 4 of Article 155 regarding the ISBA's obligation to convene a Review Conference[202]. The Implementation Agreement and UNCLOS are to be interpreted and applied as a single instrument. In the event of any inconsistency between the Implementation Agreement and UNCLOS, the Implementation Agreement shall prevail.[203] Although there were no amendments to UNCLOS, the effect is a *de facto* modification of a number of provisions relating the Part XI of UNCLOS[204]. However, this approach does underline the reluctance of many States to amend or in any way disturb the delicate balance created by UNCLOS.

(ii) The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[205]

During the 1992 United Nations Conference on Environment and Development, concerns were raised of the over-fishing of the high seas, and the failure of States to implement various provisions of UNCLOS.[206] It was widely recognised that the relevant provisions of UNCLOS were too widely drafted, and needed more specific interpretation. However, delegates at the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks agreed that UNCLOS could not be changed or amended[207]. The terms of UNCLOS could, however, be more precisely defined and more effectively implemented through the adoption of a future instrument. In 1995 an Implementation Agreement was adopted to implement the provision of UNCLOS in a more definitive manner, and had the effect of improving "the texture of the convention, capturing scientific, technological, legal and other developments since the conclusion of the Convention thirteen years earlier."[208] This Agreement is to be applied in the context of and in a manner consistent with UNCLOS[209] and is not to prejudice the rights, duties and jurisdiction of States under UNCLOS. In effect, UNCLOS provided a framework within which further agreements could be made to adapt to changing circumstances in high seas fishing.

What is evident from these Implementation Agreements is the reluctance of State Parties to amend the substantive provisions of UNCLOS. These agreements have been

---

[201] Anderson. D.H "Further efforts to ensure universal participation in the United Nations Convention on the Law of the Sea" 43 *International and Comparative Law Quarterly* (1994) p.889.
[202] Anderson D.H "Legal Implications of the Entry into force of the UN Convention on the Law of the Sea" 44 *International and Comparative Law Quarterly* (1994) p.317
[203] Article 2 of the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 UN Doc. A/48/L.60
[204] Statement by Satya N. Nandan, Secretary-General of the International Seabed Authority to the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998 p.4
[205] See generally Lévy, J-P. and Gunnar, G.S., *United Nations Conference on Straddling Stocks and Highly Migratory Fish Stocks: Selected Documents* (1996) Martinus Nijhof Publishers
[206] Particularly, the failure to implement articles 87(2), and article 116-119. Swan, J., *Implementation of the Law of the Sea Convention Straddling and Highly Migratory Fish Stocks and High Seas Fishing* Paper Presented at the Thirty First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998 p.1
[207] Anderson (44 *International and Comparative Law Quarterly*) *op.cit* p.322
[208] Swan *op.cit* p.1
[209] Article 4 of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

framed in such a way that they are to apply together with the provisions of UNCLOS as a single instrument. As such, it is necessary to ensure that direct conflict between the Implementation Agreement and the provisions of UNCLOS are avoided.

(iii) Possible implementation agreement concerning articles 303 and 149 of UNCLOS

A number of States have suggested that as article 149 and 303 of UNCLOS are too vague and inappropriate to form a practical basis for an adequate protection regime, an implementation agreement, similar to that applying in the case of Straddling Fish Stocks and Highly Migratory Species, should be introduced in order to provide clearer interpretations of these articles. This approach is consistent with the view of those States that regard UNCLOS as a definitive convention, inappropriate for alteration[210].

The uncertainties regarding these proposals lie in the content of the proposed implementation agreements. The UNESCO draft convention proposes a regime which not only grants State's jurisdiction to control activities directed at UCH, but also creates a set of benchmarking standards for the practise of underwater archaeology. While the determination of jurisdictional competencies amongst States may be a valid consideration for an implementation agreement to UNCLOS, it is inappropriate for the implementation of a set of archaeological standards. This is the preserve of the international organisation given the mandate to preserve the world's cultural and archaeological heritage, namely UNESCO. An implementation agreement would therefore not be able to establish a sufficiently comprehensive regime for the preservation of UCH. Such an agreement could be useful supplementary to a UNESCO agreement in that it could more clearly establish the meaning of articles 149 and 303. However, as it suggested below, that fact that States cannot agree on the interpretation of articles 149 and 303, particularly the meaning of article 303(4) makes it unlikely that such an implementation agreement could be negotiated in another forum.

Any implementation agreement would have to be interpreted as conforming with UNCLOS, and as such, it would not be possible for the agreement to alter the rights and duties of States under the UNCLOS regime. Should the implementation agreement include substantive provisions substantially similar to those contained in the UNESCO draft convention in relation to the jurisdiction of States, it would be necessary to determine whether these proposals conform to the existing structure under UNCLOS. As shall be evident in the discussion below, it is submitted that as States cannot agree on the extent to which the regime proposed in the UNESCO draft is in conformity with the UNCLOS regime, it would be extremely unlikely that an implementation agreement along the lines of the UNESCO regime could be negotiated.

[210] The UK, for example, in requiring any future convention to be in full conformity with the provisions of UNCLOS, has suggested that it should be drafted as an implementation agreement, entitled "Agreement for the Implementation the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to Archaeological and Historical Objects Found at Sea" (UK Background Document for Use by UK delegation to UNESCO Meeting, 19 - 24 April 1999). The Norwegian delegation proposals was substantially similar to that of the UK. The Norwegian proposals read, "An Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the protection of the underwater cultural heritage."

Consistency in regimes

Introduction

From the above discussions, it is evident that articles 149 and 303 of UNCLOS are too vague and ambiguous to provide an adequate preservation regime for UCH in a number of maritime zones. In terms of jurisdiction to preserve UCH, under the 1958 Conventions and UNCLOS, coastal State jurisdiction to control activities directed at UCH go no further than the CZ. In an attempt to improve the preservation regime for UCH in a number of maritime zones, the UNESCO draft convention proposes the extension of coastal State functional jurisdiction over the CS and EEZ. This extension of coastal State jurisdiction involves the introduction of rights and duties of States not contained in the UNCLOS regime. It should be noted that it is not possible to amend UNCLOS to take into account this proposed new regime, nor will the adoption of an implementation agreement be able to alter the substantial provisions of UNCLOS.

It is essential that any convention negotiated in UNESCO does not create conflicting provisions with existing conventional law. The regime proposed in the UNESCO draft convention is based on the presumption that it does not conflict with the provisions of UNCLOS, though it will introduce rights and duties not contained in UNCLOS. This, has, however, not been accepted by a number of States, and the debate turns on the interpretations of a number of provisions of both UNCLOS and the UNESCO draft convention.

Codification of customary international law and progressive development of the law of the sea

The preamble to the UNESCO draft convention states that there is a "need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the 1982 United Nations Convention on the Law of the Sea of 10 December 1982".

This section of the preamble is difficult to interpret. It envisaged two separate processes, namely, (a) the codification of customary international law[211], and (b) the development of new international law, relating to the preservation of UCH. Both are then to occur in conformity with UNCLOS and international law.

The codification of customary international law

Customary international law[212] has been defined as a rule of international law that grows "out of concordant practise by a number of states over a considerable period of time with a conviction that the practise is required by, and consistent with, prevailing international law and is generally acquiesced in by other states."[213] Article 38 of the Statute of the International Court of Justice directs the court to apply "international custom, as evidence of a general practise accepted as law."[214] Customary international

[211] For a general discussion on the nature of customary international law, see Danilenko, G.M., *Law-Making in the International Community* (1993) Martinus Nijhoff Publishers pp.75-129. See also Lowe, A.V., "Do general rules of international law exist?" 9 *Review of International Studies* (1983) pp. 207-213

[212] For further discussion on customary international law and the Law of the Sea, see Macrae *op.cit* pp.181-222, Gamble and Frankowska *op.cit* pp.491-511, Larson *op.cit* pp.75-85, Butler *op.cit* pp.182-186

[213] Anand *op.cit* p.184

[214] For a more detailed discussion on this provision, see Danilenko *op.cit* pp. 77-81

law therefore has two aspects: (a) general State practise and (b) the acceptance of State's of this general practise as law, i.e. *opinio juris*. These may, however, be extremely difficult to determine.

Generally, State practice must be consistent and be one that has existed without interruption for a period of years. The period of years required might differ in each case. Often, the closer the customs relation to advancing technological changes, the quicker the time period[215]. Some customs, such as innocent overflight, developed in an extremely short time[216]. Although it would be unrealistic to require universal acceptance of a practice before it could be recognised as customary international law, it is difficult to determine just how many States will be required to satisfy the term 'general State practice.' Similarly, it is uncertain what the effect of State protests to a practise will have. Anand argues that it is possible for one State's persistent and unambiguous protest in certain circumstances to be sufficient to reject the notion of customary international law of other States' practice.[217] O'Connell, however, argues that unanimity is not essential for the formation of customary international law, but rather that 'generality of will' is.[218] *Opinio juris* is an essential requirement for the recognition of customary international law. A custom must be applied by a State in the belief that it is in accordance with international law and binding.

The process of codification of customary international law of the sea is clearly evident from UNCLOS III. Between 1958 and 1982, a number of new rules of international law developed through State practice and *opinio juris* which were not contained in the 1958 Geneva Conventions. This included the recognition of archipelagic States, the EEZ and transit passage through international straits[219]. Many aspects of these changes were in fact contrary to the 1958 Geneva Conventions. Customary international law may therefore develop even though it would appear that the rules are in conflict with existing treaties. It is therefore theoretically possible for aspects of the UNESCO draft convention to amount to customary international law despite the fact that it conflicts with UNCLOS.

A number of states have extended their jurisdiction to cover the preservation and management of UCH in various maritime zones. France[220] and Tunisia[221] have extended their national legislation to cover UCH over the CZ in accordance with article 303(2) of UNCLOS. Denmark[222] had also extended its national competence over a zone that extends 24nm from the baseline from which the territorial sea is measured. Denmark, however, has not declared a CZ, and referred to this area as a section of the CS. More recently, Denmark has extended its jurisdiction over UCH found within its exclusive fishing zone, which extends for 200nm[223]. Australia[224], Ireland[225], Spain[226], Cape

---

[215] Cheng, B., "United Nations Resolution on Outer Space: 'Instant' International Customary Law" 5 *Indian Journal of International Law* (1965) pp.23-48

[216] Macrae *op.cit* p.203

[217] Anand *op.cit* p.186

[218] O'Connell, D.P., *International Law* 2nd ed., 1970 p.15

[219] Gamble and Frankowska *op.cit* pp.499-503 (note that some commentators do not regard the development of the EEZ, archipelagic state or transit passage to have reached the stage of development to amount to customary international law at all. At most, they could be regarded as a usage. See, for example, the comment by UNCLOS III President, Tommy Koh, as quoted in Gamble *et. al op.cit* p.505)

[220] Act Concerning Marine Cultural Property 89-874 of 1989 of 1 December 1989

[221] Protection of Archaeological Property, Historic Monuments and Natural Urban Sites Law No. 86-35 of 9 May 1988

[222] Conservation of Nature Act as amended by Act.530 of 10 December 1984

[223] The Protection of Nature Act N0. 9 of 3 January 1992

Verde[227], Seychelles[228] and Portugal[229] have extended their national jurisdiction over the continental shelf, while Morocco[230] and Jamaica[231] have extended their national jurisdiction over the EEZ.

Clearly these extensions of coastal state jurisdiction are too few and dissimilar to constitute any notion of customary international law[232]. However, it is noticeable that no other State has objected to these extensions. Nevertheless, these State practices will amount to a mere usage[233]. Article 5 of the UNESCO draft convention will therefore not amount to the codification of customary international law. As these terms of the UNESCO draft convention do not amount to customary international law, it would appear that the reference to codification of customary international law in the preamble is unjustified and does not directly relate to any of the provisions of the UNESCO draft convention.

Progressive development of the law of the sea

The UNESCO draft convention contains provisions that are neither contained in existing conventions nor amount to a codification of existing customary international law. They are therefore envisaged as progressive development of the law of the sea through the introduction of new rules of international law. Progressive development is evident, for example, in the introduction of the deep seabed mining regime in Part XI of UNCLOS. As Part XI is not regarded as customary international law, those countries that did not sign the Convention, such as the US, do not consider themselves bound by these rules.

The implementation of both articles 5 and 12 of the UNESCO secretariat draft will clearly amount to an extension and alteration of the provisions of UNCLOS, and therefore progressive development of the law of the sea. It is clear that the UNESCO draft convention is based on the presumption that it is considered to be progressive development, and that this progressive development is in conformity with UNCLOS. The basis for the regime being in conformity with UNCLOS, despite the fact that it introduces new rights and duties of State in various maritime zones, lies in an interpretation of article 303(4).

During the meeting of experts to discuss the UNESCO draft convention in April 1998, the representative of the UN Division of Ocean Affairs and the law of the Sea and the Chairman of the meeting expressed the view that article 303(4) allowed further development in international law to preserve UCH.[234] It was also concluded that though

---

[224] Australian Historic Shipwrecks Act No.190 of 1976, as amended by the Historic Shipwrecks Amendment Act No. 88 of 1980
[225] National Monuments (Amendment) Act No. 17 of 1987
[226] Spanish Historical Heritage Law 16/1985 of 25 June 1985
[227] Law No. 60/IV/92, Dec. 10, 1992
[228] Maritime Zones Act 1977
[229] Law No. 289/93 of 21 August 1995
[230] Moroccan Decree no.181179 of 8 April 1981
[231] Jamaican Exclusive Economic Zone Act 33 of 1991
[232] Blake, however, argues that coastal States have recognised customary international law extending jurisdiction over shipwrecks beyond the CS. See Blake, J., "The Protection of Underwater Cultural Heritage" 45 *International and Comparative Law Quarterly* (1996) p.819
[233] Macrae *op.cit* p.202 footnote 107
[234] CLT-96/CONF.605/6 Paris, May 1996 p.8

articles 149 and 303 are of little practical importance, article 303(4)[235] recognises this, and paves the way for negotiations leading to an international convention which can give adequate attention to the question of the preservation of UCH.[236] Article 303(4) has been described as article 303's saving grace, as it "leaves the way open for specific agreement on the underwater cultural heritage".[237] It is with reference to this provision, that a more comprehensive convention to preserve UCH is being considered by UNESCO[238].

It has, however, been argued that this interpretation of article 303(4) is excessively broad. It is clear from a literal interpretation of this article that the purpose of article 303 is to delineate coastal State jurisdiction over UCH, but nothing more than that, hence the maintenance of the *status quo* in terms of the application of salvage law, ownership or cultural exchanges of UCH. Bederman suggests that article 303 was intended to be the definitive word on coastal State jurisdiction over UCH and therefore article 303(4) does not sanction further developments in that regard.[239] Thus, the introduction of any new regime would have to comply with the jurisdiction structure envisaged in article 303, although it could include the development of a further preservation regime based on this jurisdictional structure. Unfortunately, the interpretation of the actual jurisdictional structure in UNCLOS is not clear, particularly in regard to the CS and EEZ. The result is that should the UNCESO draft convention be adopted, a possible conflict could result between its provisions and those of UNCLOS.

Conflict between treaties

The relationship between two separate independent treaties which may cover the same subject-matter, and which may contain provisions which conflict can often be determined in relation to the intention of the parties and according to the 1969 Vienna Convention on the Law of Treaties[240]. Article 30(3) of the Vienna Convention states that where two treaties covering the same subject matter conflict, the provisions of the later treaty will prevail. The earlier treaty will therefore apply only to the extent that its provisions are compatible with those of the later treaty. This, however, is only a rebuttable presumption. It may be that the later treaty is subject to the provision of an earlier treaty. Article 30(2) of the Vienna Convention states that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Article 311(2) of UNCLOS, for example states that; "this convention shall not alter the rights and obligations of State Parties which arise from other agreements compatible with this convention and which do not affect the enjoyment by other State Parties of their rights or their obligations under this convention." Whether the relationship between the UNESCO draft convention and UNCLOS can be governed by these principles will depend on whether they are considered to sufficiently cover the same subject matter. This is a matter of interpretation, and may be difficult to ascertain. Nevertheless, this is

[235] Section 303(4) states that the provisions of article 303 are "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."
[236] O'Keefe and Nafziger *op.cit* p.398
[237] Prott and O'Keefe (1984) *op.cit* p.105
[238] Dupuy, R.J., and Vignes, D.A., *Handbook on the Law of the Sea* Vol. 1 1991 Martinus Nijhoff Publishers p.575
[239] Bederman *op.cit* p.13
[240] 1155 U.N.T.S. 331

certainly the approach a number of States have advocated for the UNESCO draft convention.

It may also be that if one treaty can be considered to be of a special nature, while the other is more of a general nature, the special treaty is to be given priority[241]. In terms of the preservation of UCH, the UNESCO draft convention will undoubtedly be regarded as the specialised treaty. As such, without a clear indication that the provisions of the UNESCO draft convention are to be subject to the jurisdictional regime created under UNCLOS, the UNESCO draft convention will prevail in cases of conflicting provisions. This would be reinforced by the fact that the UNESCO draft convention was the later convention. As article 311(5) of UNCLOS states that "this article does not affect international agreements expressly permitted or preserved by other articles of this convention", it may be that article 311(2) of UNCLOS will not apply if the UNESCO draft convention can be interpreted as an agreement within the definition of article 311(5).

Although these rules may provide a mechanism for determining which treaty may take precedence in regard to provisions applicable to a common subject, it would be preferable to avoid any conflict when drafting the later treaty. Negotiations concerning the UNESCO draft convention have predominantly revolved around this avoidance of conflict, and turns on the various interpretations of both provisions of UNCLOS and the UNESCO draft convention adopted by States. It is therefore necessary to briefly consider the interpretations States have given these provisions during the negotiating.

Varying interpretations of UNCLOS

The various interpretations of UNCLOS are based on State self-interest, with each State attempting to justify its position through legal interpretation of the draft convention and UNCLOS. Although a wide range of opinions were stated by delegations at the 1998, 1999 and 2000 meeting of experts, it is possible to broadly divide these opinions into three discernible viewpoints. For convenience of usage and terminology, these State viewpoints are divided into three groups.

Group I

A number of states are adamant that any new convention must be in full conformity with UNCLOS[242]. By this it is meant that the UNESCO draft cannot contain any new rights or duties of States in the various maritime zones. Particular attention has been focused on article 5 of the secretariat draft and resulted in the number of alternative proposals considered above. The US[243], for example, regarded article 5 as "completely unacceptable" and inconsistent with the balance of interest created in UNCLOS, as it grants coastal States significantly expanded control over activities of other States in

---

[241] Reuter. *P Introduction to the Law of Treaties* (1989) Pinter Publishers p. 102

[242] The UN General Assembly have noted the work being undertaken in UNESCO to draft this convention, and in 1998 "stressed the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provision of the Convention [UNCLOS]" Doc. A/RES/53/32, 6 January 1999 para.20. This was re-emphasised in 1999, and specific request was made to bring this UN resolution to the attention of the Director-General of UNESCO. Doc. A/Res/54/31, 18 January 2000 para.30-31

[243] The US working paper at the 1999 meeting included the following statement; "The United States believes that the regulation of underwater cultural heritage should be consistent with the allocation of rights and duties of States set out in the Law of the Sea Convention, particularly with regard to fishing, protection of the marine environment, the laying of submarine cables and pipelines, the establishment and use of artificial islands, installations and structures, and marine scientific research." CLT-99/CONF.202/5 Rev, Paris, April 1999

these maritime zones. This sentiment has been supported by Russia, Germany[244], UK[245], Norway[246], Japan[247], France[248] and the Netherlands[249]. Russia, for example, ratified UNCLOS in 1997, and is eager to ensure that the provisions of the convention represent current international consensus on the rights and duties of States in the various maritime zones. Though generally supportive of the UNESCO draft, Russia does not support any extension of coastal State's rights beyond that laid down in UNCLOS. The Greek delegation observed that UNCLOS provides an obligatory framework for provisions for the preservation of UCH, and that there was therefore no question of modifying the convention by creating a new maritime zone.[250] Greece had previously noted that UNCLOS did not regulate the question of the preservation of UCH in detail, and that, within the framework of UNCLOS, there was "a need to draft a convention which would be of global application."[251] Some States are as yet undecided. The UK, for example, generally welcomed the convention, though stressed that the relationship between the convention and UNCLOS needed clarity. It saw as problematic, the creation of new zones without naming them, and was concerned with the extension of coastal State jurisdiction.

In order to ensure that the UNESCO convention is in full conformity with UNCLOS, a number of articles have been proposed for inclusion in article 3 governing 'general principles'. These include;

"[n]othing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention."

or in the alternative;

---

[244] Germany has constantly objected to any extension of coastal State jurisdiction and any change to UNCLOS. The creation of a new maritime zone was declared to be "an interference in the fundamental principle under international maritime law of the freedom of the high seas enshrined in the Convention on the Law of the Sea". The German comment went on to state that it was vital that the UNESCO draft was in complete harmony with UNCLOS, which was considered to be "the universal and fundamental agreement governing all legal conditions pertaining to the seas and oceans". UNESCO Doc. 29C/22 Paris August 1997, Annex II p.3. See Appendix VI

[245] CLT-2000/CONF.201/3, Paris, April 2000 p.9

[246] The Norwegian delegation stated that; "[a]ny new regulations for the protection of underwater cultural heritage must be in full conformity with the relevant provisions of UNCLOS, including those concerning the sovereign rights and jurisdictions if the coastal states and the rights and duties of the flag State" General remarks by Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of foreign Affairs, 19 April 1999. Furthermore, Norway regarded the idea of a "gap" in the UNCLOS protection regime regarding the scope of article 303 as based on an incorrect interpretation of UNCLOS. Throughout the 1998 and 1999 negotiations, the Norwegian delegation strongly opposed any extension of jurisdiction or meddling with the UNCLOS regime.

[247] Japan expressed "a concern that this paragraph [article 5(1)] implies a violation of the limitation of coastal state jurisdiction."CLT-99/CONF.204/5, Paris, April 1999, CLT-2000/CONF.201/3, Paris, April 2000 p.9

[248] France considered it a "slippery slope if UNCLOS exceptions are carved out" (1998 Meeting), and stated that it "finds it hazardous to interpret article 303(4) of UNCLOS as opening the door to a post-UNCLOS international convention providing for the extension of a coastal State's jurisdiction over archaeological heritage situated on its continental shelf or in its EEZ." CLT-2000/CONF.201/3, Paris, April 2000 p.9

[249] The Netherlands argued that article 303(4) should not be interpreted as a licence to extend coastal State jurisdiction further than allowed for in UNCLOS. It stated that "a better protection of such archaeological and historical objects in areas beyond jurisdiction is necessary and urgent while at the same time maintaining the delicate balance achieved in the 1982 United Nations Convention on the Law of the Sea." Doc.28C/39, Paris, 31 October 1995, Annex p. 3. See also CLT-2000/CONF.201/3, Paris, April 2000 p.9

[250] Doc. 29C/22, Paris, August 1997, Annex II p.4

[251] Doc. 28C/39, Paris, 31 October 1995, Annex p.1

"This agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention"(the Convention being defined in article 1 as meaning the United Nations Convention on the Law of the Sea"[252])

The US proposed the inclusion of the following paragraph;

"Nothing in this Convention affects the freedom of the high seas or the rights and responsibilities of States in regard to the exclusive economic zone, continental shelf, marine scientific research or the marine environment in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea."[253]

Group II

A number of States, including Australia[254], Canada[255], Italy[256], Malta[257], Philippines, Poland, Spain, Greece, Turkey, India, Tunisia and Argentina, argued that the convention must be consistent with UNCLOS, and therefore do not differ to this extent with group I. However, they regard the provision of the UNESCO draft to be consistent with UNCLOS, including the extension of functional jurisdiction envisaged in article 5. Canada, for example, supported extended coastal State jurisdiction, and argued that such an extension to preserve UCH is sanctioned by article 303(4). Further, Canada argues that as the regime created by article 5 is not contrary to UNCLOS, it should not be interpreted as being inconsistent with UNCLOS. By this it is meant that the regime is not contrary to UNCLOS as it does not alter or amend the provisions relating to existing rights and duties of States, but rather introduces new rights and duties. Canada did, however, stress that the UNESCO negotiations should not amount to a reopening of UNCLOS III. Canada does, however, regard the sovereignty over UCH as an area that was not substantially covered during UNCLOS III, and susceptible to renegotiations in terms of article 303.[258] The Philippines, argued that the "proper jurisdictional regime relies on the coastal State's regulatory jurisdiction over underwater cultural heritage in the exclusive economic zone and on the continental shelf (...) We see this arrangement as efficient, practical, and above all, legal. The Philippines agrees with the emerging view that this is the appropriate regime as it concentrates responsibility on a single state, in a manner that complements a coastal State's duty to protect and preserve the marine environment and to manage the natural resources of the water column and the sea bed.

---

[252] Drafted as article 2bis CLT-99/CONF.204, Paris, August 1999

[253] CLT-99/CONF.202/5 Rev, Paris, April 1999

[254] The Australian delegation are reported to have stated that it" favours this option because if affirms coastal States' right to regulate underwater cultural heritage in their EEZ and on their continental shelf and that this jurisdiction is clearly limited to responsibility for protection, not rights of ownership. It rejects claims that this Option is inconsistent with the jurisdictional scheme of UNCLOS since UNCLOS does not specify the status of underwater cultural heritage in the EEZ and on the continental shelf and UNCLOS article 303(4) envisages the creation of further international agreements for their protection. It believes that this coastal State jurisdiction is the only practical way to protect underwater cultural heritage and that article 2*bis* of this Convention ensures the jurisdictional scheme of UNCLOS is preserved." CLT-2000/CONF.201/3, Paris, April 2000 p.8

[255] CLT-2000/CONF.201/3, Paris, April 2000 p.9

[256] CLT-2000/CONF.201/3, Paris, April 2000 p.9

[257] 'Comments of Malta concerning the draft convention on the protection of the underwater cultural heritage' distributed at 2000 meeting.

[258] Anderson notes that only small minorities of issues were inadequately considered at UNCLOS III, which includes "high seas fishing and historical wrecks on the seabed." Anderson (44 *International and Comparative Law Quarterly*) *op.cit* p.322

The coastal state has the best position in implementing the protective goals of the draft Convention."[259]

Thus, the extension of coastal State jurisdiction is considered to be consistent with the provisions of UNCLOS, particularly article 303(4). In response to the comments made by States falling within Group I, it was suggested that Group II States were weary of general political statement about concerns with UNCLOS.[260]

Group III

Some States have argued that UNCLOS is not set in stone, and the law of the sea is susceptible to progressive development. Rights and duties of States could therefore evolve from those entrenched in UNCLOS, and that, in accordance with article 303(4), UNCLOS allows for such future development. It has also been noted that by adopting a new convention in accordance with article 303(4), States will be giving effect to their duty under article 303(1) to "protect archaeological and historical articles found at sea and to co-operate for that purpose." Israel, for example, has supported this approach and argued that article 303 does not prevent further coastal State jurisdiction further offshore. Spain has taken a similar approach. In its comments on the ILA draft, Spain supported the drafting of a new international convention, and suggested that a cultural heritage zone should be created which would extend "approximately 100 miles for the waters adjacent to the sovereign areas of the coastal state."[261] Implicit in this recommendation is the acceptance that a new convention may alter the rights and duties of States enumerated in UNCLOS, and that though this may readjust the balance created in UNCLOS, it would not jeopardise this balance of interests. While most States would appear to regard article 5 as having gone too far in extending coastal State rights over the CS and EEZ, Turkey and Tunisia considered article 5 to be insufficient to preserve UCH in these zones, and have called for a strengthening of article 5 of the UNESCO draft. Hungary, as a landlocked State has an interest in UCH that may be found in international inland waters, as well as Hungarian vessels that floundered at a time when Hungary extended to the coastline. It has, however, opposed any reference to UNCLOS in the convention, and regards the convention as a standard setting convention which needs to take UNCLOS into account.[262]

Conclusion

The preservation of UCH requires the formulation of a sound regulatory infrastructure to ensure that appropriate scientific techniques are used in order to preserve the archaeological value of UCH. It was thought that the coastal State was best placed to provide a strong regulatory regime, and that this should be extended as far offshore as possible in conformity with existing international law. However, it has not only proved difficult to determine the provisions of the existing international law that may apply to UCH in the various maritime zones, but it has also proved extremely difficult to determine the international framework within which new jurisdictional competencies can be developed.

---

[259] The Philippine opening statement at the 2000 meeting delivered by H.E.Hector K. Villarroel, 3 July 2000

[260] See also O'Keefe, P.J., Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural heritage" 8(2) *International Journal of Cultural Property* (1999) p.569

[261] Doc. 28C/39, Paris, 31 October 1995, Annex p.5

[262] Hungary proposed the deletion of reference to UNCLOS from article 5, option 1. CLT-2000/CONF.201/3add, Paris, June 2000 p.5

The problems regarding the jurisdictional regime proposed in the secretariat draft have yet to be solved, and it is unfortunate that so much time has been spent on these considerations rather than on areas around which consensus might be reached. The 2000 meeting of experts was, however, more productive in its attempts to avoid protracted negotiations on issues of jurisdiction, but rather concentrated on the regime considered in chapter 3, particularly with regard to the principle of international co-operation. Whilst problems concerning the scope of the convention still require resolution, the UNESCO draft convention is beginning to develop into a convention which may succeed in securing broad consensus amongst States. This process has, however, taken a considerable period of time. In order to ensure that a draft convention can be presented to the UNESCO General Conference for adoption in as short a period of time as possible, it is necessary to critically consider the viability of the existing draft, and the process through which the convention was drafted, as a tool in identifying problems and mistakes which may be corrected. This shall be undertaken in the following chapter.

Chapter 5

Problems and Process: A Critical Evaluation

Introduction

The UNESCO initiative to preserve UCH is a decade old. Originating in the formation of the ILA Cultural Heritage Committee, the initiative has been considered by the ILA committee, by a UNESCO committee of experts, and by three meetings of governmental experts, and yet no generally acceptable draft can be presented to the General Conference of UNESCO. While all appear to agree that such a convention is necessary[1], no such agreement can be reached on the drafting of its substantive provisions. Indeed, no agreement can be reached on the very justification for the convention or the principles upon which it might be based. The urgency of the need to adopt a convention was expressed at the third meeting of experts by the Filipino delegate, who stated that "even as we speak today, we all know that, in some vulnerable parts of the world, the pillaging and desecration of these cultural properties continue unabated. The major cause of this unspeakable tragedy is the absence of a single, consistent, preventive and punitive regime that deters the mercenaries of our collective underwater cultural heritage."[2]

Given the urgency to adopt an international convention on the preservation of UCH, this chapter will consider the factors that have hindered the development of the draft convention. UNESCO plans to convene a fourth meeting of experts in early 2001, with the hope that a draft can be prepared for presentation to the General Conference in late 2001. Failure to achieve a draft at this stage may, at best, result in a delay in its adoption until 2003, and at worst, an ossification of negotiations which is unlikely to lead to any convention in the future. It therefore becomes important to consider the problems and process that have so far prevented the adoption of a convention, so as to better understand ways and means to overcome these.

There are, however, hopeful indications that a convention may emerge from this process. On the conclusion of business of the first working group at the 2000 meeting, the Chairman declared that although consensus had yet to be reached on a number of issues, "the smell of consensus was in the air".[3] Taking into account a consideration of the process to date, it is possible to anticipate the form of a future convention. The final part of this chapter will consider the possible form of this anticipated convention and will critically evaluate its effectiveness as a preservation regime for UCH.

---

[1] CLT-96/CONF.605/6, Paris, 22-24 May 1996 p.2, (which states; "The experts unanimously agreed that there is a need for a legally binding instrument for the protection of the underwater cultural heritage ..."); CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998 p.3 (which reads, "many experts considered that the adoption by a large number of States of an international legal instrument was needed in order to ensure that the protection of underwater cultural heritage would be a national priority...") CLT-99/CONF.204, Paris, August 1999 p.1 (which reads "... the creation of a legal instrument was warranted.")

[2] The Philippine opening statement at the 2000 meeting delivered by H.E.Hector K. Villarroel, 3 July 2000

[3] Comment by Professor Tuillio Scovazzi, Italian Delegation 2000 meeting.

Problems with the UNESCO draft convention

As was indicated in chapters 2-4, there are a number of areas on which consensus has yet to be reached. While these were considered in detail in the previous chapters, the more fundamental problems of the draft will be considered in this section.

Preservation or protection: The aims of the convention

The successful drafting of an international convention requires clarity in the formulation of its aims. It is unfortunate that within the negotiating draft, it is not possible to clearly identify the aims of the convention. As was discussed in chapter 1, 'protection' is used to describe a regime that entrenches any one of a number of values attributable to the UCH. While the UNESCO draft certainly provides for the realisation of the archaeological value of UCH, it is unclear as to what other values it might 'protect'. This not only concerns the realisation of the economic value of UCH, but also the delicate balance between the recognition of the universal character of UCH and its national character.

The draft clearly maintains that the justification for the 'protection' of UCH is that it is of importance to, and an integral part of, the heritage of humanity[4]. It further holds that all States have a collective responsibility for achieving this 'protection'.[5] However, the draft also contains reference to the preferential rights of States that may have 'a historical or cultural link' to UCH. [6] This notion of preferential rights derives from article 149 of UNCLOS, and has been the subject of attempts to incorporate such a notion in the UNESCO draft.[7] Given the problems in interpretation and delimitation of these rights delineated in article 149, and the failure in the UNESCO draft to determine the content of these rights, it is extremely difficult to determine whether the recognition of these rights fall within the term 'protection'. Would, for example, the right to the return or restitution of UCH, as was proposed by some States, be included in the 'protection' regime?[8] Moreover, how these preferential rights are to be reconciled with the right of humanity as a whole to UCH is an important omission of the draft, undermining any attempt to interpret 'protection'. Thus, whilst designating the convention as one to 'protect' UCH, without delineating the values attributable to the UCH, it is impossible to determine the scope of 'protection'.

While the draft is designated as one to 'protect' the UCH, the general principle uses the term 'preserve'. While there is no indication as to why these alternative terms have been used, the contents of the draft suggest that these terms are synonymous. Yet the preamble may be used to formulate a more precise meaning of the term 'preserve'. The preamble highlights the dangers to the UCH through the use of unscientific methods of excavation and the disturbance of UCH through commercial exploitation and other uses of the oceans. It thus concerns the disturbance of the UCH in a manner which is unscientific and which results in the loss of the archaeological value of the UCH. By 'preservation', the general principle must therefore be considered to mean the safeguarding and conservation of the physical integrity of the UCH and the

---

[4] CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.1 para.1.

[5] *Ibid* para.8

[6] *Ibid* para.8; articles 3(2); article 5(4), option 1; article 7, option 2; article 2ter, option 2; article 2ter, option 3; article 7, option 3; and article 12.

[7] See chapter 3

[8] See chapter 3

archaeological value derived therefrom. If the term 'protection' can be interpreted to mean preservation in this sense, then the draft can be formulated with a clear aim. Failure to limit the aims of the draft convention to the realisation of this value has resulted in a plethora of other values being considered, some of which cannot easily be reconciled. Until such time as the aims of the convention can be reformulated and constrained, it will be difficult to achieve a clearly formulated and practically enforceable preservation regime.

Uncertainties concerning the scope of the Convention

The failure to clearly identify the aims of the convention, or at least to limit the aims to that which might be manageable and achievable, has resulted in the scope of the convention undergoing numerous changes, narrowing in some respects and widening in others.[9] As the convention comes under increasing pressure to widen in scope, so the resulting regime requires constant revision. Justification for the proposed changes lies in the need for conformity with conventional international law, the application of similar scientific standards to all UCH irrespective of where it may be found, difficulties in reconciling private law property rights in different States, difficulties in implementing an appropriate management regime and in the differing nature of the activities which pose a threat to the archaeological value of the UCH[10]. In part, these problems are a result of the failure to clearly delimit the aims of the convention.

A general widening of the scope of the convention has repercussions for the form the preservation regime will take. Generally the wider the scope of the convention, the 'softer', or less normative, the substantive provisions, as more compromises will have to be made on an increasing number of issues. A delicate balance will need to be achieved to ensure that a sufficiently normative structure is imposed in a widening scope.

A conflict of values

In chapter 1, the development of the conflict between the realisation of the archaeological and economic value of the UCH was discussed, and it was concluded that while these values have in the past been the subject of conflict, they are not doctrinally antithetical. Some would disagree. Others, while recognising this, would claim that elimination of any commercial incentive to recover UCH is an appropriate management tool, and therefore required in the draft convention. It is thus difficult to characterise the nature of this disagreement as either ethical or managerial. This uncertainty has permeated the drafting process. While the ILA draft clearly identified the elimination of salvage law from the preservation regime, it did not clarify the grounds for such a stance, other than illustrating the inappropriateness of the application of salvage law principles to UCH[11]. This uncertainty had repercussion when UNESCO used the ILA draft as a basis for the UNESCO draft. While appearing to respond to reservations concerning the elimination of salvage law, the UNESCO draft contained an absolute abolition of the commercial incentives to recover UCH.[12] This provision is drafted as a fundamental feature of the preservation regime, and as such, requires broad consensus if a practical and achievable preservation regime is to be formulated.

---

[9] See chapter 2

[10] See chapter 2

[11] O'Keefe, P. and Nafziger, J. A. R., "The Draft Convention on the Protection of Underwater Cultural Heritage" 25(4) *Ocean Development and International Law* (1994) p.409

[12] See chapter 3

As identified in chapter 3, the elimination of the realisation of the economic value of UCH is both politically unacceptable to many States and practically unenforceable by most States[13]. If an effective preservation regime is to result from this process, those who advocate the normative embodiment of the ethical opposition to the commercial utilisation of UCH will have to compromise and participate in the formulation of a regime that does not rely on such a principle. Failure to do so will result in either negotiations failing to produce a draft or, at best, a draft which is only acceptable to a small number of States, excluding the most powerful treasure salvage States, such as the US and UK.

The jurisdictional dilemma

From the first report of the ILA Cultural Heritage Committee to the 1999 meeting of experts, debate concerning the proposed jurisdictional regime has dominated negotiations[14]. States' views with regard to jurisdiction are polarised, and interpretations of UNCLOS irreconcilable. Debate has concerned the extent to which the proposed extension of coastal State jurisdiction to regulate activities directed at UCH is compatible with conventional international law, namely UNCLOS. What has not been *discussed in any depth*, is the justification for this proposed regime, presumably, as the issues of compatibility would have to be solved first. This is unfortunate, as it has resulted in negotiations being dominated by law of the sea issues rather than cultural heritage law issues.

A viable international preservation regime will require the allocation of competencies between States, and possibly between States and international organisations. It is therefore vital that problems regarding jurisdiction are resolved. It would appear that, irrespective of the value of the various interpretations given to UNCLOS regarding compatibility with the proposed extension of jurisdiction, there is no consensus on the issues, and as such, no draft convention could conceivably be adopted containing this proposed regime. It is therefore necessary for States to formulate an alternative solution, based on a broadly accepted compromise.

An onerous duty

In 1990 the ILA Cultural Heritage Committee stated that the "[e]stablishment of a global regulatory body seems unrealistic at this time. The best alternative may be to allocate control of the underwater cultural heritage to States, subject to clear international standards."[15] This allocation of control requires States to undertake a number of duties with regard to UCH. These include the establishment of national services, or improvement of existing ones in order to facilitate the reporting of finds to the coastal State and the dissemination of this information to other States and/or international organisations; the issue of permits; the seizure, conservation and disposal of seized UCH; the policing of port facilities and the establishment of educational and training facilities. As was indicated in chapter 3, many of these duties may be onerous on developing States, necessitating consideration as to the manner in which such a duty

---

[13] See chapter 3

[14] ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) pp.1-17; CLT-99/CONF.204, Paris, August 1999 pp.5-8

[15] ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) p.13

might be imposed, particularly the extent to which such duties might be couched in normative terms. While a number of States have made overtures concerning the granting of centralised duties to an international organisation, such as UNESCO, with regard to information sharing, no detailed consideration has been made in this regard. The draft therefore suffers from a debilitating vagueness as to the duties of States and UNESCO. While this may be due in part to the uncertainties regarding the jurisdictional scheme to be implemented, it would appear pragmatic to assume that coastal State jurisdiction will not be extended over the EEZ and CS and that, in order to proceed with the structuring of a preservation regime, consideration be given to the form of State duties under the convention.

Critical analysis of the draft and the process that has led to these problems

When, in 1999, the negotiating draft was circulated to States, initial appearances would have led one to conclude that negotiations were, on the whole, unsuccessful in reaching a compromise position and that the process was at risk of stalling. However, what the negotiating draft did was highlight those areas where attitudes had been polarised, and consensus would never be achieved, necessitating a change in the approach to both the negotiating process and the structuring of the substantive provisions of the draft. Thus, the 2000 meeting of experts was productive in the sense that attempts were made to concentrate on areas where compromise might be reached, and ignore those areas where consensus was unreachable. This bodes well for the next meeting of experts, and it is predicated that a convention will indeed emerge from this prolonged process. However, in order to facilitate this process, it is necessary to consider the reasons why the process has been so prolonged and why the problems considered above have arisen.

Growing pains of underwater archaeology

Underwater archaeology, described in the 1970's as a nascent discipline[16], is coming of age. The growing pains of the discipline are reflected in the process of negotiations to 'protect' the UCH. In chapter 1, the development of underwater archaeology was discussed, and the emergence of the conflict between the realisation of the UCH's archaeological and economic value identified. While this conflict was resolved by some States in their territorial waters in favour of the realisation of the archaeological value by the elimination of the realisation of the economic value, this conflict still exists in international waters. In a sense, the development of the UNESCO draft has been an attempt for such a preservation regime to 'grow' by covering both territorial and international waters. By doing so, underwater archaeology achieves two advantages: firstly, the archaeological community gains control of the material through its legal 'protection'[17]; and secondly, from this legal protection, the discipline gains increased

[16] Anon., *Underwater Archaeology: A Nascent Discipline* (1972) UNESCO Publishing

[17] In his doctoral thesis Carmen explains that in the UK, archaeologists in the mid 1800s' appropriated the existing law of Treasure Trove in an attempt to build up a national collection of antiquities. The appropriation of an existing law to further new policy objectives enabled the nascent principles of archaeology and museum curation to gain legitimacy as an activity that is aimed at the public good. While clearly the appropriation of salvage law to further the policy objectives of underwater archaeology is not possible (see chapter 1), a similar process of utilising the granting of legal 'protection' to UCH is evident in the formation of the UNESCO process. See Carman, R.J., *Valuing Ancient Things: Archaeology and Law in England* (1993) Unpublished PhD Thesis, University of Cambridge p.47

legitimacy.[18] There is more at stake for the archaeological community than simply preserving the archaeological value that may be realised from the application of appropriate standards to activities directed at UCH. The process of extending coastal State control and the elimination of commercial incentives to recover UCH have therefore been important policy objectives, and are reflected in previous attempts to formulate an international or regional preservation regime.[19]

As an emerging discipline, underwater archaeology must strive to justify its existence. With regard to the policy objectives sought in the UNESCO draft, it is essential for the archaeological community to fully articulate its position. This, however, has not been particularly easy, as much has relied on supposition and generalisations. For example, there is little quantifiable data on the damage being caused by treasure salvors, or, for that matter, by any other sea user. In a number of States, particularly the US and UK, the archaeological community has not been able to convince the public that the activities of treasure salvors are necessarily detrimental to UCH. This has led, for example, to suspicion concerning the proposal to include an educational duty for States in the UNESCO draft[20]. This suspicion arises from the fact that the archaeological community assumes that the public interest is best served by the preservation of UCH and that, where the public does not appear to appreciate this fact, appropriate education is necessary. However, there appear to be few studies undertaken to measure the extent to which the public does value the archaeological information that can be derived from UCH[21]. As such, it often appears that this assumption is manufactured to suit the archaeological community's own agenda and is therefore self-serving.

While the inclusion of the educational provision in the draft convention is viewed by some with suspicion, it is arguably the most powerful preservation mechanism included in the draft. In order to realise its full potential, the educational provision requires implementation in such a way that it is viewed as educational rather than propaganda or a public relations exercise.

Failure to take other interest groups into account

International law relies on a system of aggregation in order for a State Government to represent a State in international dealings. It assumes that the Government of the State represents the interests of all those to whom it is subject. International law is then a system of aggregation of State interests to represent a totality of aggregated interests. Naturally, a system based on aggregation will not reflect the interest of all participants, be they individuals or States. At a national level, this system will exclude those not represented by the State for whatever reason the national system determines. It also has the effect of inadequately representing those that cannot be contained within the system of aggregation of one particular State, such as multi-national corporations. At an international level, the system of aggregation will also have the effect of excluding those

---

[18] Guerzoni notes that "[c]ultural heritage and preservation laws are two sides of the same coin. They recognise and legitimise each other, and can therefore not be analysed separately." Guerzoni, G., "Cultural Heritage and Preservation Policies: Notes on the History of the Italian case" in Hutter, M. and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.107-132

[19] See chapter 2

[20] See chapter 3

[21] Economic techniques that may be utilised to measure the value the public might place on UCH include contingent valuations and willingness-to-pay studies. For a discussion on these techniques, see Frey, B.S., "The Evaluation of Cultural Heritage: Some Critical Issues" in Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan pp.31-49

common interests of mankind that cannot be represented by the State system collectively.[22]

The inadequacies of the system of aggregation have been highlighted during the UNESCO negotiations. UNESCO has been accused by a number of commentators of having ignored certain interest groups in UCH, most notably, the treasure salvage industry and fishermen.[23] The perception is that States have exercised an organisational power over the other interest groups by ensuring that the allocation of this resource takes place in an arena in which the other interest groups are excluded. Yet this cannot be a valid accusation in regard to the international treaty-making process, though it might be levelled at the manner in which the draft of the convention evolved before being submitted before State representatives for approval. As the draft is now before State representatives, continued lobbying by those whose interest have not been represented by State Governments to UNESCO is futile.[24] It may, however, have an effect on State representatives.

The manner in which the policy objectives of the archaeological community have been sought has not always taken into account other interest groups, such as salvors[25]. This may be partly due to the fact that the 'purist' sector of the archaeological community regard the very existence of the latter as antithetical to the archaeological ethic. In the political decision making process which seeks to achieve the policy objectives of the archaeological community, not all interest groups are able to participate with equal effectiveness. This is dependent to a large extent on the nature of the group. Properties such as the group size, duration of individual membership, formalisation, the extent of social differentiation or cohesion within the group will all affect the impact the group will have in the political arena.

At first glance, the archaeological community appears to have a strong formal structure, with lifelong duration of membership and a high degree of social cohesion with common professional norms and values.[26] Members generally belong to a professional organisation, such as the Society for Professional Archaeologists (US) or Institute of Field Archaeologists (UK), which require qualifying criteria for membership.[27] A failure

---

[22] Allott, P., "*Mare Nostrum*: A New International Law of the Sea" 86 *American Journal of International Law* (1992) p.775

[23] Stemm, G., "An overview of 1998 UNESCO Meeting in Paris" *http;//www.prosea.org/articles-news/overview_98_UNESCO_Meeting.html*

[24] For example, June 1998 letter from the Professional Shipwreck Explorers Association Inc. to UNESCO

[25] While the other interest group that should be considered is the sport diving community, its effect on the UNESCO draft has been minimal, and will therefore not be considered in any depth. This community lacks the solidarity and cohesion necessary to make its voice heard in the international arena, though individual States have taken onboard the concerns of the industry within its own territory. This lack of solidarity is due to the fact that though divers usually belong to a training agency, such as PADI, CMAS, SAA or BSAC, there is no one agency that can claim to represent all sports divers. The members of a particular training agency usually only have one thing in common; they are trained to dive. Within any training agency, there exists a wide range of interests in UCH, from underwater scrap metal merchants to amateur/avocational archaeologists. This makes it very difficult for these training agencies to take a unanimous stand on certain issues being confronted by UNESCO. It would, however, appear that, at the very least, the sports diving community would like to continue to be able to have access to historic wreck sites for recreational purposes. For reactions from the sports diving community regarding the UNESCO convention see Cowan, R., "Wreck divers face a worldwide threat" *Diver* (October 1998) pp.40-41.

[26] Giesecke, A.G., *Historic shipwreck resources and state law: a development perspective* (1992) Unpublished PhD Thesis, Catholic University of America p.27

[27] Other Societies include the Society for Historical Archaeology (US), the Nautical Archaeological Society (UK) and Society for American Archaeology. These do not, however, have qualifying

to conform to the formalised structure or accepted norms of the group will result in sanctions being applied. This might include expulsion or blacklisting, preventing an individual from presenting or publishing research papers.[28] As the majority of archaeologists are employed by institutions with strong formal structures, such as State departments, the internalisation of group norms is strengthened. This has often prevented the archaeological community from interacting with the treasure salvage community. Therefore, it would appear that the former has been able to exert a disproportionate amount of influence in the political arena. This impression is strengthened by both the ILA draft and the UNESCO draft convention[29] and the ICOMOS Charter, which could be construed as a 'purist' archaeologists' draft in the sense that it includes a preservation regime which only takes into account the interests of that group. Criticism has been levelled at the drafting of the ILA draft in that "no input was invited from any persons or entity other than those concerned with historic preservation values."[30] While there appears to be a growing sector of the archaeological community which recognises that, in order to create a workable regime, other interest groups, most notably the treasure salvage and sport diving communities, must be taken into account[31], contributions by archaeologists at the meetings of experts have tended to endorse the 'purist' standpoint.

The lack of participation by the treasure salvage community has not necessarily been the result of a deliberate omission orchestrated by the archaeological community. The treasure salvage community has traditionally lacked the solidarity that prevails within the archaeological community. In 1991, Anne Giesecke, the drafter of the US Abandoned Shipwreck Act, stated that "[s]alvors have never acted together as a group and should not be expected to act together as a group because they have minimal common interests."[32]. Although salvors generally know of one another, and may have some contact, often through diving conferences and meetings, little information is passed between them as the industry is fiercely competitive and, by its very nature, highly secretive. This lack of formalisation and social cohesion has undermined the group's effectiveness in the political arena. Its influence has traditionally been based on the huge financial resources and technical capabilities that it is able to muster. However, the nature of the treasure salvage community is changing as it strives to adapt in order to

---

membership criteria, and both qualified archaeologists, treasure salvors and sport divers may be members. See Giesecke *op.cit* p.52

[28] It would appear that the Society for Historical Archaeology regularly prevent members from delivering papers at Society meetings if they consider the presenter to have breached the Society's ethics code. See Giesecke *op.cit* p.54. This would have appeared to have occurred in 1997 when Greg Stemm, a salvor, was prevented from presenting a paper together with Edward Mahoney and Michele Malarey entitled "Sustainable Commercial Recovery of Deep Water Shipwrecks: Opportunities and Issues for Professional Archaeologists" as the Society considered co-operation between archaeologists and salvors to be contrary to the Societies Code of Ethics.

[29] ILA Sixty-Sixth Conference, *Report of the International Committee on Cultural Heritage Law*, Buenos Aires, Argentina (1994) pp. 432-451; CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[30] Bederman, D.J., "Historic Salvage and the Law of the Sea" 30 *University of Miami Inter-American Law Review* (1998) p.113. It is interesting to note that in the official report of the ILA draft convention, Professor Bederman himself is acknowledged as having assisted the committee in the drafting of the ILA draft convention. O'Keefe and Nafziger *op.cit* p.417

[31] For example, many of the participants at the Maritime Archaeology Session of the World Archaeological Congress (held at the University of Cape Town, South Africa, 10 - 14 January 1999.) supported the principle of the UNESCO initiative, but considered it unworkable if other interest groups were excluded. The Maritime Archaeological Session of the Congress put forward the following resolution; "The World Archaeological Congress endorses the UNESCO initiative on the protection and preservation of underwater cultural heritage in international waters. Constituent members of the WAC look forward to the opportunity of discussing the draft proposals in more detail."

[32] Giesecke *op.cit* pp.65-66

participate in the political decision-making process on an equal footing with other user groups. Thus, organisations such as the Professional Shipwrecks Explorers Association have been founded, which exerts an important influence in the US delegation[33]. In light of the fact that UNESCO had observed that "[d]uring 1990-1991 the [ILA] Committee consulted the United Nations Law of the Sea Committee which made no reply, the International Maritime Organisation (IMO) which indicated that it was not interested in the proposals since its primary interest was in the removal of wrecks which were a danger to shipping; and the *Comité maritime international* (CMI) which indicated that it was not directly interested in the matter."[34], it appears that there was little interest from those organisations which may have some representation from the salvage industry. In the report of the first meeting of experts, it was stated that "the experts were invited by virtue of their personal qualification in such a way as to represent expertise in law of the sea, salvage law and cultural heritage protection"[35] The salvage law experts, however, generally tended to be admiralty lawyers, rather than treasure salvage practitioners, and there appeared to be an erroneous perception amongst other interest groups that the treasure salvage industry were represented in some capacity through organisation such as the IMO or the Salvage Association. [36] As such, an important criticism levelled at the process of negotiating this draft concerns the omission of the treasure salvage community's participation.

A meeting of 'experts'

In considering the development of cultural heritage policies, Throsby commented that "[i]n the area of heritage protection, 'expert' opinion and entrenched professional interest may on occasion weigh more heavily in decision-making as to the desirable form and extent of government intervention than the views of the community at large, resulting in policies that serve the interests of those in a position of power rather than of people in general."[37] Such an observation could easily have been made with respect to the UNESCO meeting of experts. It is clear that a number of representatives of States are archaeologists that appear to represent the position of underwater archaeology rather than the position of the State they are purported to represent. Whilst their expertise may be in underwater archaeology, it is clear that at times these State 'experts' are not able to grasp the complexities of drafting an international instrument, and underestimate the importance of compromise as a necessary tool for obtaining consensus. The majority of State experts were, in fact, members of their State's permanent representative to UNESCO[38]. While this had the advantage that the representatives were *au fait* with the

---

[33] Hereafter "ProSEA". Established in 1998, ProSEA is an amalgamation of the Deep Shipwreck Explorers Association (DEEPSEA) and the Historic Shipwreck Salvors group, an incorporated group comprising maritime lawyers, divers, salvors and academics. ProSEA is incorporated under the existing DEEPSEA legal structure as a non-profit trade association under the laws of the State of Florida.

[34] Doc. 29C/22 Paris, 5 August 1997 para.19

[35] CLT-98/CONF.202/7 Paris, 29 June - 2 July 1998, para.1

[36] At a meeting at the UK Foreign and Commonwealth Offices on 1 December 1999, a representative of the Salvage Association categorically stated that the organisation he represented "is not an association which represents salvors". Note prepared by Mr Peter Edwards on the interests of the Salvage Association distributed during the meeting.

[37] Throsby, D., "Seven Questions in the Economics of Cultural Heritage" in Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press p.24

[38] A rough count of the delegates at the 1999 meeting of experts revealed that approximately 51% (89 of 176) were members of their State's permanent delegation to UNESCO, 28% were legal experts, particularly from the foreign affairs, naval or law of the sea divisions of the State Governments and 20% were archaeologists who worked for Government cultural heritage divisions or museums. While no member States of UNESCO had any representatives of the salvage or sports diving community as a member of their delegation, one observer State, the US, contain the Chairman of ProSEA, Mr Greg

negotiating procedures of UNESCO and the requirements for the drafting of an international convention, they were not prepared for the technical issues associated with the scientific techniques associated with UCH, nor the complexities associated with a draft that contained the congruence of three distinct spheres of law. The remaining members of most State delegations consisted of legal experts in foreign affairs or the law of the sea, resulting in these delegates concentrating on issues other than cultural heritage or technical matters. As a consequence of the participation of this divergent group of 'experts', negotiations consisted of a multitude of opinions from various sources that were not concentrated on the technical issues that should have been at the heart of the negotiations. As such, negotiations have been protracted, repetitive and prone to stalling.[39] When discussing article 149 and 303 of UNCLOS at the first meeting of experts, it was stated that "the law of the sea had been devised by people who did not have specific expertise in archaeology".[40] It is hoped that a similar criticism will not be aimed at those drafting the UNESCO draft.

The inclusion of archaeologists, a salvor and State representatives sympathetic to both constituencies has resulted in the conflict between the archaeological community and the treasure salvage community being waged within the international negotiating process. Rather than consider the manner in which the archaeological value of the UCH can be preserved irrespective of the justification of the interest group undertaking the activity directed at UCH, the negotiations have tended to contrast polemical ethical positions. As such, the UNESCO process has become a forum for the resolution of this conflict, negating progress on the drafting of a generally acceptable, and pragmatic, convention.

The problem of transition from a non-governmental organisation to an international organisation

The initiative to preserve UCH in international waters arose in the ILA, a non-governmental organisation. While the Cultural Heritage Committee of the ILA obtained comments from a number of States as well as experts in all spheres of law related to the preservation of UCH before drafting the ILA draft, these inputs were limited. This may be due primarily to the nature of the process in a non-governmental organisation and the reluctance or apathy of some States to contribute. As the members of the Cultural Heritage Committee are generally from developed States, mostly European, it may also be that there was limited input from developing States[41]. It was therefore not possible for the ILA to anticipate State response to the draft that was produced in 1994. Indeed, this draft was not produced by the ILA Cultural Heritage Committee without controversy concerning the exclusion of salvage law and the cultural heritage zone proposals being completely resolved, with the result that, the *rapporteur* of the committee has stated that "it is unlikely that any of our committee members expected

---

Stemm, of Odyssey Marine Exploration, Tampa Bay, Florida (count taken from CLT-99/CONF.204, Paris, August 1999 pp.13-44)

[39] The ILA Cultural heritage Committee considered a number of these problems in its bi-annual report in 1996, and have undertaken to prepare a set of recommendations for international organisations to improve their methods of operation in undertaking negotiations that consist of State representatives from a variety of backgrounds. ILA Sixty-Seventh Conference, *Report of the International Committee on Cultural Heritage Law*, (1996) pp.4-6

[40] CLT-98/CONF.202/7 Paris, 29 June - 2 July 1998. Para.33

[41] CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.53

the ILA draft to serve as some sort of a cookie cutter for a UNESCO treaty."[42] As such, the ILA draft should be viewed as a valuable contribution to the beginning of a debate and a starting point from which negotiation would begin.

When exposed to a wider group of experts in Greenwich in 1995, the conference concluded that "it seemed from the tenor of several comments that the draft convention as it stands may not command sufficient support internationally."[43] This was further emphasised when UNESCO completed its preliminary study on the advisability of preparing an international instrument for the preservation of UCH, which, for the first time, contained direct State comments on the provisions of the draft.[44] Many of these comments were directed at the jurisdictional controversy. Aware at this early stage that the ILA draft suffered from a debilitating provision, the Chairman of the ILA Committee was reported to have claimed that the jurisdictional controversy "was not an essential part of the Convention and that it could be removed without affecting the rest."[45]

In 1996, UNESCO convened a meeting of non-governmental experts to further consider the feasibility of drafting a convention. While some experts considered the ILA draft suitable for the basis of the drafting of a UNESCO convention, others thought it should play a lessor role, though its value was sufficient for it to act as "one of the basic reference material for drawing up a new UNESCO Convention."[46] When the UNESCO secretariat undertook the drafting of the convention, it "considered the ILA text when preparing the following draft, noting discussion and comment on its provisions and proposing changes where these appeared to represent a consensus. This draft, however, suppressed one article of the ILA draft, added several more, and redrafted many of the articles for clarity."[47] However, the UNESCO draft substantially mirrored the ILA draft, and in place of the cultural heritage zone article which had been repressed to take account of State opposition to that provision, article 5 granting permissive extension of the coastal State regulation of UCH was included. It is, arguably, at this point that the seeds for the prolonged and protracted negotiations were sown. By drafting the UNESCO secretariat convention without any direct State participation, it may have underestimated the degree of contentiousness that prevailed over some of the provisions of the draft[48]. Thus, some of the problems inherent in the ILA draft were simply transferred from the non-governmental organisation to the international organisation without the opportunity for States to have any direct input.

While the secretariat draft should have been viewed again as simply a starting point for negotiation, its status appears to have changed from the first meeting of experts to the third. Although some deliberations during the first meeting concentrated on the

---

[42] Personal correspondence with Professor James Nafziger, *Rapporteur* of ILA Cultural Heritage Committee, 9 September 2000.

[43] Summary Report of the National Maritime Museum Conference on Protection of Underwater Cultural Heritage, Greenwich 3-4 February 1995 p.13

[44] Doc. 28C/39, Paris, 4 October 1995 and Doc. 28C/39 Add., Paris, 31 October 1995

[45] Doc. 28C/39, Paris, 4 October 1995 p.6

[46] CLT-96/CONF.605/6, Paris, 22-24 May 1996 para.53

[47] CLT-96/CONF.202/5 Paris, April 1998 p.2

[48] The ILA Cultural Heritage Committee commented, with regard to cultural heritage conventions in general, that "[i]t would be possible for a convention to be prepared, adopted by a particular organisation, and presented to states without any input by the latter. It could be presented as an ideal solution to whatever was the problem at hand. However, there is little evidence that states would support such an initiative" ILA Sixty-Eighth Conference, *Report of the International Committee on Cultural Heritage Law*, (1998), Taipei, Taiwan, Republic of China p.231

substantive provisions, most debate appears to have concerned the general principles of coastal State extension and the position of salvage law. However, at the second meeting of experts, the secretariat draft continued to be the basis for negotiations, resulting in repetition of the comments made by States at the first meeting, as it appeared that these comments had not been taken into account. As such, negotiation at the second meeting concentrated on the substantive provisions of the Secretariat draft as if it was a concrete proposal. The result was the production of a complex negotiating draft convention that included three completely separate options with respect to the coastal State jurisdiction. Given the already complex nature of the draft, and the divergent mixture of State 'experts', it is not surprising that negotiations were beginning to stall and become ossified. The third meeting of governmental experts may prove to have been the most productive. Rather than concentrating on the substantive provisions of the negotiating draft, steered by effective chairmanship[49], the working group charged with considering the jurisdictional structure of the convention considered areas on which consensus might be reached, and began to develop substantive proposals from general propositions. Had such a process occurred at the first meeting of experts, negotiation may have been more productive.

The problems with the transition of the ILA draft to an international forum, and the resulting problems and perceptions of the draft during the meeting of experts cannot be laid at the feet of either the ILA or the UNESCO secretariat. Rather, these problems have arisen due to the complex nature of the negotiations; the late stage at which a number of States made their views on the draft known[50]; the participation of experts in divergent subjects and, above all, the politicisation of the international negotiation process.

A question of form

The urgency of the problem of the preservation of UCH in international waters has quickened pace, necessitating some mechanism to ensure effective preservation. Exactly what mechanism would be most appropriate has, however, been a matter of debate[51]. As its first task, the ILA Cultural Heritage Committee had identified the question of whether the drafting of an international convention would be the most effective way to preserve the UCH.[52] An affirmative answer was provided during the Working Session of 1990, and the ILA draft was developed on that basis.[53] At the Greenwich meeting of experts, however, the "group felt that a Conventional approach may not be the best way to proceed on the issue at this time. In the longer term it may be the way."[54] As a result,

---

[49] Professor Tullio Scovazzi, of the Italian delegation chaired the third working group at the third meeting of Governmental Experts in 2000.

[50] Hungary, for example, only made any comments regarding the draft convention prior to and at the third meeting of experts, at which it made substantial proposals for the amendment of the scope of the convention and of a number of provisions of the draft. See CLT-2000/CONF.201/3add, Paris, June 2000

[51] As Brice notes, "[a]ny comprehensive international treaty would take perhaps a decade or more to conclude and bring into force: but the threat is that in the interim priceless sources of knowledge would be destroyed forever." Brice, G., *Maritime Law of Salvage* 3rd ed. (1999) Sweet & Maxwell p.4-14

[52] ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) p.14

[53] ILA Sixty-Fifth Conference, *Report of the International Committee on Cultural Heritage Law*, Cairo, Egypt (1992) p.339

[54] Summary Report of the National Maritime Museum Conference on Protection of Underwater Cultural Heritage, Greenwich 3-4 February 1995 p.11

a variety of methods were proposed for preservation in the short term.[55] However, in March 1995, the executive board of UNESCO reported that "the secretariat has arrived at the conclusion that the most desirable way to proceed would be by way of drafting a new instrument in the form of a convention."[56] An important justification for this was that a convention would be needed which would allow States to claim extended jurisdiction off their shores.[57] It was made clear in this feasibility study that the only effective way to preserve UCH was to allow extended coastal State regulation, which necessitated the use of an international convention, as no other form would suffice. It would therefore appear that little consideration was given to the use of alternative forms of introducing a preservation regime for UCH. While alternative forms, such as a UNESCO Recommendation or a UN General Assembly resolution may have provided some degree of preservation, an international convention would obviously provide the most suitable preservation regime as it would be binding on States. However, this had the effect of concentrating State observations of the duty that would be imposed, and the extent to which this duty might conflict with other international duties imposed by conventional international law, particularly by UNCLOS. As such, debate arose as to whether this binding convention should take the form of a self-standing convention, or as an implementation agreement to UNCLOS.

Although the negotiations concerning this draft have taken a number of years[58], and may still take some more, it is submitted that given the subject matter of the essential provision of the convention, no other form would have been substantially quicker or appropriate[59]. However, the provisions of the Rules of the Annex have not proved to be contentious, other than Rules 2 and 19, and therefore may have been suitable for implementation as non-binding technical standards for States to implement prior to the drafting of the convention. As such, the Convention could have incorporated the negotiations at a later date, allowing sufficient time for detailed negotiations whilst providing at least some standards applicable to activities directed at UCH.

Complexities of the draft

The congruence of three spheres of law

When considering the drafting of conventions related to cultural heritage, the ILA Cultural Heritage Committee noted that "cultural heritage law is just emerging as an important sphere of law – both nationally and internationally. The principles on which it

---

[55] The Greenwich report concluded that "[w]hat is required now is a document that identifies interests and seeks balances. It could take the form of a practical guide. The UN Law of the Sea Office has published several guides for the use of State on various topics, and such a document is badly need on underwater cultural heritage." Summary Report of the National Maritime Museum Conference on Protection of Underwater Cultural Heritage, Greenwich 3-4 February 1995 p.11. See also Brown, E. D., "Protection of the Underwater Cultural Heritage" 20(4) *Marine Policy* pp.325-336 and Greenfield, J., *The Return of Cultural Treasures* (1989) Cambridge University Press, Cambridge p.214

[56] Doc.146 EX/27, Paris, 23 March 1995 para.44. In 1997, the General Conference of UNESCO endorsed this approach. Doc. 29C/22, Paris, 5 August 1997 p.4

[57] Doc.146 EX/27, Paris, 23 March 1995 para.43

[58] Brice notes that "[a]ny comprehensive international treaty would take perhaps a decade or more to conclude and bring into force: but the threat is that in the interim priceless sources of knowledge would be destroyed forever." Brice *op.cit* p.4-14

[59] This would include implementation of the draft convention as an Implementation Agreement to UNCLOS, as the jurisdictional dilemma would, it is submitted, not have been easily solved even in this forum.

is based are still in the process of formulation. This being so, the drafting of international instruments becomes doubly complex."[60] This is particularly pertinent to the UNESCO draft.

The principles upon which the UNESCO preservation regime is constructed are derived from three different spheres of law; the law of the sea, admiralty law and cultural heritage law, which have tended to work in relative isolation from one another. The UNESCO draft convention is a complex attempt to develop a convention at the congruence of these three spheres of law, each of which is underpinned by very different policy objectives. This does not mean to say that these spheres of law cannot all pertain to one particular situation. As has been indicated in previous chapters, UNCLOS includes provisions that relate to both admiralty law and cultural heritage law[61], while admiralty law, including the 1989 International Salvage Convention, regulates matters that have a bearing on UCH[62]. Similarly, numerous international cultural heritage conventions and recommendations are also applicable to UCH in some maritime zones.[63] The proposed convention attempts to amalgamate aspects of these three spheres of law in one convention, which will be negotiated in one forum, and which will address the policy objectives of each sphere. So, for example, the draft convention proposes to establish an international jurisdictional regime which determines State's obligations to one another with respect to the control of UCH in various maritime zones and the extent of each State's control jurisdiction. Determinations of these issues have traditionally fallen within the sphere of the law of the sea. The attempt to address these issues in this forum is particularly problematic, and will be considered in greater detail below. The convention also proposes to alter aspects of existing law which determines the rights and duties of persons engaged in activities directed at UCH, which has, to a large extent, been determined according to admiralty law. However, it is the primary aim of the convention to introduce technical standards of underwater archaeology which are based on those standards which apply to terrestrial archaeology, and which have been determined according to international technical standards set in cultural heritage conventions. The proposed integration of these standards with the other spheres of law will, however, affect each sphere of law and the source of many of the conventions negotiating problems and inadequacies stem from the difficulties in undertaking this integration process in one forum.

Private law issues of ownership and abandonment

A great deal of litigation with regard to UCH concerns private law issues of ownership and abandonment.[64] Each State has jurisdiction to determine title to and disposition of UCH found in its territory. The State's courts will, in accordance with its choice of law rules, determine ownership to UCH, ordinarily respecting ownership if there has not been any act of abandonment. However, these national

---

[60] ILA Sixty-Seventh Conference, *Report of the International Committee on Cultural Heritage Law*, (1996) p.4

[61] See chapter 3

[62] See chapter 4

[63] See Appendix VII

[64] See for example; *Columbus-America Discovery Group v. Atlantic Mutual Insurance* 742 F.Supp 1327 (E.D.Va. 1990); 974 F.2d 450 (4th Cir.1992); *Treasure Salvors, Inc v. Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330, 340 (5th Cir. 1978); *Pierce v. Beamis (The Lusitania)* [1986] 1 Q.B.384; [1986] Lloyd's Rep. 132; *Sea Hunt, Inc. v. Unidentified, Shipwrecked and Abandoned Vessel or Vessels* 47 F.Supp. 2d 678; (E.D.Va. 1999); *Sea Hunt, Inc. v. Commonwealth of Virginia* 221 F.3d 634; 2000 (4th Cir. 2000)

laws differ dramatically from State to State[65]. There is thus little consistency between these laws, and any attempt to harmonise these laws would be futile. The ILA Cultural Heritage Committee, however, thought it advisable to include an article defining abandonment as a guide for State implementation and to define the scope of the convention. While this was an attempt to avoid questions of ownership, uncertainties regarding the determination of abandonment had the effect of broadening negotiation to include these issues, particularly with regard to State owned vessels[66]. While most cultural heritage conventions do not concern issues of ownership[67], negotiations on these issues at UNESCO became a central feature of the first meeting of experts. This had the effect of further confusing negotiations with questions of private law, unlikely to be resolved in this forum. The elimination of abandonment was the first indication that in cases where items limiting the scope of the convention were contentious, a solution favoured was to delete them from the convention, thus widening the scope. It is conceivable that other contentious issue may follow suit, including any provisions referring to activities incidentally affecting UCH and the place of salvage law. Similarly, the attempt at providing for regional agreements, which States can enter into in international law without the need for such a mandate in the UNESCO draft convention, may simply be a way of avoiding certain contentious issues that could be resolved by regional agreements.

---

[65] For an overview of the national laws of a number of States, see Dromgoole, S.(ed.), *Legal Protection of the Underwater Cultural heritage: National and International Perspectives* (1999) Kluwer Law International. See also ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, Queensland, Australia (1990) pp.3-6

[66] See, for example, the most recent example of uncertainties regarding ownership of State owned vessels in *Sea Hunt, Inc. v. Commonwealth of Virginia* 221 F.3d 634 (4th Cir. 2000); on appeal from the decision in *Sea Hunt, Inc. v. Unidentified, Shipwrecked and Abandoned Vess4el or Vessels* 47 F.Supp. 2d 678; (E.D.Va.1999)

[67] Although cultural heritage in private ownership does not necessarily fulfil many of the values attributable to cultural heritage, and often conflicts with cultural heritage policies, these items nevertheless remain cultural heritage and worthy of protection. Ownership should therefore play little part in protecting the cultural heritage. Thus, few of the conventions or recommendations are dependent on questions of ownership. For example, the 1907 International Peace Conference included provisions for the protection of cultural property in the event of armed conflict was not confined to public property, but included private property. (Toman *op.cit* p. 10). Article 56 of the Hague Regulations states that "the properties of municipalities, that of institutions dedicated to religious, charity and education, the arts and sciences, even when State property, shall be treated as private property". Similarly, the 1954 Convention concerns the protection of cultural heritage 'irrespective of origin or ownership'.(Article 1, 1954 Hague Convention). Whilst these conventions protect cultural heritage from physical destruction, the 1970 UNESCO convention attempts to protect cultural heritage from illicit trafficking. While the illegal export or import of cultural heritage does not necessarily involve questions of ownership, it may arise if the legality of the export or import is based on questions of ownership. Whilst the 1970 UNESCO Convention only applies to cultural heritage which has been designated by the State as being important, the 1995 UNIDROIT Convention has no such requirement, so that a private owner can claim restitution. Questions concerning the ownership of cultural property stolen and subject to illicit trade and determined to a large extent by private international law, a discussion of which is beyond the scope of this thesis. For a more detailed discussion on private law aspects of the illicit trade in cultural heritage, see Reichelt, G., "International Protection of Cultural Property" 1 *Uniform Law Review* (1985) pp.79-147; Gordon, J. B., "The UNESCO Convention on the Illicit Movement of Art Treasures" 12 *Harvard International Law Journal* (1971) pp.537-556; Williams, S. A., "Recent Developments in Restitution and Return of Cultural Property" 3 *International Journal of Museum Management and Curators* (1984) pp.117-129; Bator, P.M., *The International Trade in Art* (1982) The University of Chicago Press; Brodie, N., Doole, J. and Watson. P., *Stealing History: The illicit trade in cultural material* (2000) The McDonald Institute for Archaeological Research; Kifle, J., *International Legal Protection of Cultural Heritage* (1994) Juristforlaget; O'Keefe, P.J., *Trade in Antiquities: Reducing Destruction and Theft* (1997) UNESCO Publishing.

A question of the forum

The choice of law-making forum

The creation of international law takes place in a number of different fora. The most important aspect of considering the adoption of international norms is therefore the forum in which the law-making activities are to occur.[68] Within the UN, various bodies are responsible for the development of international law and the organisation of law-making activities. Examples include, the International Law Commission, the Sixth (Legal) Committee of the General Assembly, the Commission of Human Rights and various *ad hoc* bodies such as the Committee of the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. The various specialised agencies of the UN also generate various conventions of a specialised and technical nature.[69] With an ever-increasing number of fora, it is inevitable that overlapping jurisdiction will occur.[70] In considering the different fora, account has to be taken of a number of factors relating to these fora, such as differences in composition, jurisdiction, decision-making procedures, working methods and the possibility of conflict with fora engaged in activities which have overlapping content matter. The appropriateness of the choice of UNESCO as the forum for the negotiation of the convention under discussion, rather than other fora that may have been pertinent, should therefore be considered in light of these factors.

The specialised international agency granted the mandate to preserve the world's cultural and natural environment is UNESCO. Although the draft convention has its origins in the ILA draft[71], this initiative is essentially a UNESCO initiative and is therefore perceived as being primarily a convention whose subject matter is cultural heritage. This has a number of important consequences for the manner in which the substantive issues are negotiated and the form the final convention might take.

Three spheres, one forum

The first consideration concerns the jurisdiction and mandate of UNESCO and the possibility of conflict with fora and international instruments engaged in activities that have overlapping content matter. The fact that UNESCO has convened these negotiations indicates that it considers the subject matter clearly within its mandate. It is clear that the draft is an integration of aspects of three spheres of law, two of which do not fall within UNESCO's mandate. It is, however, inevitable that in the international law-making process, a forum may be faced with a subject matter that concerns a number of different international bodies and law-making fora, and is tolerated as long as this

---

[68] Danilenko, G.M., *Law-Making in the International Community* Martinus Nijhoff 1993 p.266

[69] *Ibid* p.270

[70] For example, while the UN Committee on the Peaceful Uses of Outer Space remains the principle UN body for dealing with issues concerning the exploration of outer space, a number of other international fora have found it necessary to consider issues which relate to these activities. These include the International Telecommunications Union when considering the use of the Geostationary orbit; the Conference on Disarmament when considering the use of weapons in outer space; the International Atomic Energy Agency regarding the effects of nuclear accidents in outer space and the International Law Commission when dealing with state liability concerned with damage caused by objects in outer space. *Ibid.* pp.270-271

[71] The Cultural Heritage Committee of the ILA undertook the drafting of the ILA draft on the basis that it would be submitted to UNESCO for consideration and should therefore follow UNESCO policies and procedures.

process does not give rise to alterations of the fundamental structure of the other spheres of law and does not result in inconsistencies between international norms. Should the UNESCO draft convention be perceived as altering the fundamental structure of either of the other two spheres of law, the appropriateness of UNESCO as the forum for negotiation will be brought into question, particularly if the changes amount to global legal reforms.

UNCLOS, negotiated under the broad diplomatic forum of UNCLOS III, is considered to be of such wide ranging provisions and importance that it can only be altered by a body convened by the UN General Assembly.[72] Such broad diplomatic fora are regarded as necessary for major legal reforms and require wide participation by member States of the international community. As such, when considering the major legal reforms required in connection with the regime concerning the use of minerals in the deep sea-bed, an *ad hoc* committee was created in order to allow as wide ranging participation as possible. The extent to which the UNESCO draft convention does involve major legal reforms has depended upon the specific interpretation States have taken to both the substantive provisions of the UNESCO draft convention and those of UNCLOS. As was evident in chapter 4, it has become very difficult to obtain consensus on the interpretations of a number of the provisions of UNCLOS, which has consequently made it difficult to determine whether the UNESCO draft convention does in fact introduce major legal reforms in this sphere of law. If it does, then UNESCO will be inappropriate as the fora for negotiation on these issues[73].

Admiralty law is essentially a matter of private law. It is, however, the subject of international regulation in the form of the 1989 London Salvage Convention negotiated under the auspices of the UN specialised agency, the IMO. An agency such as the IMO is regarded as a specialised technical agency that is particularly suited as a forum in which negotiations on technical issues and reforming existing law can be undertaken.[74]

UNESCO can be regarded in a similar way, as the specialist agency in relation to cultural heritage matters. Although such fora are of a more limited size in terms of State participation, they are more responsive to States that are involved in the particular activities under discussion. When, however, the topic under discussion takes on global significance, the fora become inappropriate and recourse is required to broader diplomatic fora. So, for example, while the exploration of outer space or the deep sea-bed may, at first sight, appear to be issues only relevant to those States with the technical capabilities to undertake these activities, the requirement for establishing a completely new international normative structure within which these States can act necessitates global participation in the negotiations. Recourse to broader diplomatic fora have most commonly been sought on the basis of the principle of universality, which holds that all States should have a right to participate in the negotiations of matters of universal importance to the international community. This approach has not, however,

---

[72] See chapter 4 regarding the provisions regarding alteration of UNCLOS

[73] Norway, for example, specifically stated for the record that it reserved its position on whether or not UNESCO is the appropriate forum for the negotiation and adoption of a convention on the protection of the underwater cultural heritage. General remarks by Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of foreign Affairs, 19 April 1999. See also O'Keefe, P.J., Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural heritage" 8(2) *International Journal of Cultural Property* (1999) p.569

[74] See generally Bekiashev, K. and Serebriaicou, V., *International Marine Organisations: Essays on Structure and Activities* Martinus Nijhoff Publishers 1981

always been successful.[75] The extent to which UNESCO is the appropriate forum will therefore depend on the extent to which States regard the convention as a specialised technical convention or one that has global legal reform implications.

Consistency is important when considering the integration of these three spheres of law as each sphere is currently regulated to some extent by conventional international law. Yet few States are in fact signatories to all these conventions[76]. An attempt to alter the effects of each convention in this particular forum has led to the possibility of a multitude of different bilateral or multilateral international obligations being created.

Forum participants

The second consideration, closely related to the first, concerns the range of participants in the negotiation process. The choice of UNESCO as the appropriate forum implies that the draft convention is a technical matter that may be limited to those States that are actively engaged in these activities. The fact that UNESCO has a more limited membership than the UN, and is considered a specialist agency, means that the topics under discussion may be of interest to a more limited number of States. Negotiations in this forum will certainly exclude some States that would participate in negotiations concerning global issues. Most important in the current negotiations is the fact that one of the most powerful world powers, not only in global terms but also in specific term to the subject matter of this convention - the US - is not a member of UNESCO. While the US has participated in the negotiations, it has only done so as an observer State and cannot participate in any decision making. While the US may still be able to influence the negotiations, the fact that it cannot participate directly must be considered a major flaw in the negotiating procedure, particularly if broader global interests are considered to be involved.

The influence of the forum

A third consideration to be taken into account concerns the influence that the nature of the forum has on the perspective taken on the subject matter under discussion. While the convention involves the integration of three spheres of law, this process occurs within the context of the one particular sphere, as a result of which the policies and procedures of that sphere have shaped the way in which the draft is structured, the manner in which States would engage in the negotiation process and the substantive topics which would be under discussion. This draft therefore conforms to previous UNESCO conventions, particularly as the secretariat draft was drafted without State participation. Given the complexities of the draft and the resulting mixture of Government experts at the UNESCO meetings, proceedings have not always proceeded with the ease that might be expected at such a meeting to discuss technical standards.

State Parties were not able to have a direct input into the substantive provisions of the draft convention until the second meeting of governmental experts in 1999. Thus, prior

---

[75] For example, attempts to remove negotiations concerning the Antarctic from a forum consisting of only those States which have ratified the Antarctic Treaty to a broader diplomatic forum have failed. Danilenko *op.cit* p.274

[76] For example, the only States that are signatories to the 1989 Salvage Convention, UNCLOS and the 1970 UNESCO Convention are Australia, China, Egypt, Greece, India, Italy, Jordan, Mexico, Nigeria, Norway, Russia, Saudi Arabia and Tunisia.

to this a number of preconceptions may have prevailed concerning the context within which this draft would be negotiated. UNESCO's approach to the preservation of the UCH has been coloured by its approach to terrestrial cultural heritage and the overriding perception of only one of a number of interest groups in UCH which has resulted in a failure to take other interest groups into account. The cultural heritage policies which have been subsumed within this UNESCO process, influenced by the dominant interest group, has also resulted in a failure to take economic consideration into account. These cultural heritage policies are, however, the antitheses of the policy underpinning admiralty law. Thus, the convention does little to integrate these two spheres of law, but rather subsumes aspects of admiralty law under cultural heritage law.

Conclusion

The adoption of a cultural heritage convention is unequivocally within UNESCO's mandate. As a specialised technical agency, it is best suited to the drafting of such an instrument, with the appropriate input of States most directly affected by the issues under discussion. The preservation regime to be established for UCH will, invariably, have an impact on the law of the sea and admiralty law as these spheres of law already contain provisions relating to UCH. However, the integration of these three spheres of law must take place in a manner, and result in an instrument, that does not fundamentally alter the structure of international law creation and ensures that the division of norm creation between various international fora is maintained. Thus, the success of the integration of these three spheres of law in this forum is dependent on the new regime being consistent with the frameworks established in each fora.

In terms of the law of the sea, the extent to which this forum is appropriate is dependent on the extent to which it introduces global legal reforms. While a number of States have argued that the UNESCO draft convention is consistent with UNCLOS, this view is not universally recognised, and if the issues of interpretation cannot be solved, then consensus cannot be reached in this forum. In light of the difficulties with these interpretations, it must be accepted that as a number of States (including a number of major maritime nations) regard the UNESCO convention as introducing major legal reforms that cannot be resolved in UNESCO, this jurisdictional dilemma will require resolution in a broader diplomatic forum. As UNCLOS governs the jurisdictional competencies of States to regulate activities affecting UCH, a broad diplomatic conference under the auspices of the UN should firstly be given the task of allocating such competencies. However, the low priority that UCH has in the world's political agenda makes such an occurrence unlikely.

The UN is ultimately responsible for ordering international society, which it not only does through the constituent organs of the UN, but also through its specialised agencies. The IMO is the specialised agency constituted in order to govern certain of the uses of the seas, including salvage. As discussed *infra*, the salvage regime created in international maritime law and the 1989 Salvage Convention are applicable to activities directed at UCH. It would therefore appear appropriate that questions of the continued application of these laws to UCH should also be determined in this forum. While the IMO have participated in the UNESCO process, it does not necessarily consider the topic to be within its particular sphere of interest. However, as it is the organ that currently governs this sphere, it should be held accountable to determine the issue of the application of salvage law to UCH. A decision that salvage law should not be applicable to UCH should be reflected in the 1989 Salvage Convention, effectively alleviating the IMO of its competence in regard to activities directed at UCH. To do otherwise,

however, will continue to subject the IMO to participation in the issue of salvage law and UCH. The UNESCO draft convention attempts to alleviate the IMO of its current international sphere of control, which, although apparently consented to by the IMO, has not been consented to by the State Parties to the IMO or the implementing conventions.

The choice of UNESCO as the forum for the negotiation of this draft convention, and the uncertainties as to its appropriateness, has also resulted in negotiations being conducted within a cultural heritage context, though most of the State representatives were not experts in this field, and the dominant topic of negotiations considered law of the sea issues. Thus, the inclusion of substantive provisions in the UNESCO draft that may have global legal reform implications has resulted in the cultural heritage dimension of the regime being overshadowed by law of the sea implications. This has tended to shift the focus of the debate away from the subject matter that UNESCO is most suited to determine and to issues of global importance that should be negotiated in a broader diplomatic forum. The dominant subject matter of the debate has therefore not been suited to UNESCO.

Politicisation

The preservation of the archaeological value attributable to the UCH requires the imposition of scientific techniques to the recovery of UCH irrespective of where it is found. It is unfortunate that the regime proposed to achieve this aim included issues which have resulted in the politicisation of negotiations. The proposed jurisdictional regime has unleashed an array of political issues unresolved in other international fora, including the question of disputed maritime territories[77], the extent of the coastal States jurisdiction over the EEZ and CS,[78] and the importance of UNCLOS itself.[79] At times, negotiations resembled similar negotiation at UNCLOS III, with the same States proposing the extension of coastal State jurisdiction in regard to UCH[80] and the same States opposing such a regime[81], leading to accusations that the UNESCO proposal was being used as a mechanism for re-opening UNCLOS negotiations.

States also took the opportunity to make overtly political statements with regard to their position on the value of UNCLOS and the law of the sea. The presence of a large number of law of the sea experts and representatives of States' foreign offices in State delegations promoted the unproductive and lengthy negotiations on law of sea issues, to the detriment of cultural heritage issues. Those States which placed a high value on the primacy of UNCLOS attempted to introduce amendments to provisions of the draft which mirrored UNCLOS provisions, particularly with regard to States' preferential rights enshrined in article 149. As a result, negotiation concerning provisions which were fundamentally cultural heritage issues, such as the definition of UCH, were

---

[77] Comments of Iraq, Israel, Greece and Turkey (1999 meeting).

[78] Comments of many South American States (1998,1999 and 2000 meeting)

[79] Some States opposed any reference to UNCLOS at all, including States which have not become Parties to UNCLOS, such as Turkey (2000 meeting) and landlocked States, such as Hungary (2000meeting).

[80] Such as Greece and Turkey (1998, 1999 and 2000 meeting)

[81] Such as the Netherlands, UK and US (1998, 1999 and 2000 meeting)

couched in terms which reflected UNCLOS provisions and therefore resulted in the subsumation of these issues under the law of the sea.[82]

The law of the sea was not the only area that prompted political posturing. As the recovery of UCH, particularly in deep international waters, involves the use of advanced recovery technology as well as archaeological techniques and equipment, so the question of the transfer of technology to developing States was raised.[83] The dichotomy between developed and developing States was further emphasised with regard to the position of former colonies *vis-à-vis* the colonial powers, in particular with regard to Spain and the position of Spanish vessels which might contain valuable cargo mined from the Americas.[84]

It is anticipated that should a draft convention emerge from this process, it will have undergone profound changes and be structured in a remarkably different way to the original ILA draft, primarily due to the extent of the politically contentious provisions contained therein. As was discussed earlier, many of these contentious issues were thought necessary to promote the policy objectives of the 'purist' sector of the archaeological community. In retrospect, it may appear that such a strategy has done more damage to the realisation of these policy objectives than good. For example, a number of States have unilaterally extended their national legislation relating to UCH over maritime areas up to the outer extent of the CS. To date, no official objections have been made with regard to these extensions. As such, States, including Australia for example, have been able to adopt a preservation regime over extensive areas of the CS and EEZ. Having raised this issue in an international forum, and evoked the controversial debate regarding the legality of such extensions, it may be that States opposed to such an extension may now take issue with these extensions or any further extensions. The raising of these issues have also resulted in some States concentrating on them in order to justify their extensions, and reluctance to reach any compromise lest it be regarded as an admission that the legality of the extension may be questionable. As a result, negotiations have been protracted and overtly political.

The effect of this politicisation was to prolong negotiations, undermine discussion of technical issues and polarise State positions. As a result, the route to consensus has been fraught with difficulties, requiring deft political manoeuvring and delicate compromises. This process has yet to be completed, though the 2000 meeting of experts has proved to be the most promising aspect of negotiations so far.

---

[82] See for example the proposal by Korea to define UCH as "objects of an archaeological and historical nature" as reflected in articles 149 and 303 of UNCLOS. CLT-2000/CONF.201/9, Paris, 7 July 2000, WG.1/WP.10, Paris, 4 July 2000

[83] The issues of the transfer of technology to developing States was raised by Egypt (2000meeting). A number of international cultural heritage conventions promote the provision of technical assistance to States. For example, article 33 of the 1999 Second Protocol to the 1954 Hague Convention encourages the provision of technical assistance at bilateral or multilateral level. This should encourage developed States to provide technical assistance to developing States, and may be particularly apt in cases where two States may have close links, particularly historical links, such as in the case of former colonies and the previous colonial powers.

[84] Recently, the city of Potosi, Bolivia, has claimed ownership of a cargo of silver and gold mined from the town and found on the wreck of the Spanish galleon *La Capitana*, wrecked off the shore of Ecuador in 1564.

The anticipated form of the convention

Whilst the problems inherent in the process of drafting this convention cannot easily be altered at this advanced stage, there are indications that consensus may be reached on a number of issues which may be sufficient on which to base a preservation regime. This section considers those areas and the nature of the anticipated convention.

Soft law?

State obligations and responsibility

The entering into a treaty by a State inevitably involves the imposition of international obligations and responsibility for that State and is governed by the principle *pacta sunt servanda*.[85] The terms of the treaty will determine the extent of the State's obligation in international law and the extent of the responsibility of the State for breaches of this international obligation.[86] The determination of these issues will depend on the subject matter under discussion. Thus, in cases where a proposed treaty is essentially a codification of customary international law, it may be relatively easy to obtain consensus on the extent of State obligations. However, in cases where a treaty is proposed which will introduce new norms and new principles in international law, it may be extremely difficult to reach consensus on these issues. This is particularly the case in those treaties which attempt to address issues of global importance that require a high degree of co-operation between States and which may require States to forgo an element of sovereignty.[87] In these cases, States are often only willing to enter into broad declarations which do not involve any legally binding international obligations, or treaties which are not only narrow in scope, but the binding obligations are formulated in such vague terms that it is difficult to determine if or when they are breached. Thus, State Parties to these conventions are provided with easy mechanisms for evading State responsibility for future acts and which allow States to act in ways that are in the interests of the State, and not necessarily in the interest of the international community, with impunity. These obligations are often termed 'soft law'.[88]

The inclusion of soft law in a treaty makes it difficult to determine the extent of a State's international obligations and to apply the principles of State responsibility for State's acts. However, it is often necessary in order to reach consensus on certain issues and may be a compromising tool utilised during negotiations[89]. While the inclusion of soft law may undermine a treaty's effectiveness as a norm-creating instrument, it may be that the treaty is only an evolutionary process in the creation of international

---

[85] Higgins, R., *Problems and Process: International law and how we use it* (1994) Clarendon Press p.16

[86] For an introduction to the principles of State responsibility, see Higgins *op.cit* pp. 146-168; Shaw, M.N., *International law* 4th ed. (1997) Cambridge University Press pp.540-584, Dixon, M and McCorquodale, R., *Cases and Materials on International law* 3rd ed. (2000) Blackstone Press pp.429-484. The ILC continues to work on a set of draft articles on State responsibility. For the most recent report of the Special *Rapporteur*, see A/CN.4/498, 16 March 1999. The UN Sixth (Legal) Committee has recently concluded a discussion on the most recent ILC reports. See GA/L/3126

[87] This is particularly the case in terms of global environmental protection, where there is no comprehensive legal regime and treaties have generally been drafted in manner that does not impose stringent State obligations or responsibilities.

[88] Dixon, M., *International Law* 3rd ed. (1996) Blackstone Press p.44; Shaw *op.cit* p.92; Levi, W., *Contemporary International Law: A Concise Introduction* 2nd edition (1991) Westview Press p.265

[89] This is true in regard to articles 149 and 303 of UNCLOS regarding the protection of UCH. See chapters 2 and 4

obligations. The more radical the propositions in a treaty, the more likely that this will be the case. The inclusion of soft law may therefore be necessary in a trade-off between obtaining a strong normative treaty and one of broad acceptance amongst States. The effectiveness of 'soft' obligations may also be as effective as normative terms if they are backed up by broad State consensus.

State obligations and the UNESCO draft convention

During negotiations at the meeting of experts, a great number of proposals were made in relation to various articles of the draft convention which would entail the 'softening' of State obligations[90]. For example, in relation to co-operation with other States in the preservation of UCH, the obligation required is to "take all necessary measures" to co-operate with other States[91]. In the prevention of activities by a State's flag vessels and nationals, a State is required to take "all practical measures"[92], while, in terms of the Rules in the Annex , States are obligated to "take all necessary measures to ensure" their application to UCH in the State's territorial waters.[93] Similarly, in a number of articles, proposals have been made to change the nature of the obligation by substituting the term "should" for the normative term "shall."[94], while the term 'unjustifiably' has been proposed to qualify a State's obligation in relation to activities which interfere with existing coastal State rights.[95] While it is submitted that the 'softer' term is necessary in some instances, a generally 'softening' of the convention may detract from its effectiveness as a normative treaty. Given the time consuming nature of negotiating such a treaty, it would have been preferable to consider speedier alternative mechanisms of introducing a preservation regime if the resulting treaty is not to create strong normative provisions.

While the above proposals may affect the normative nature of the treaty, one particular proposal made during the 1999 meeting will substantially undermine the obligation of States. As is evident from the discussion of jurisdiction in chapter 4, in areas beyond coastal State jurisdiction, the nationality principle will apply. However, a number of States argued that the obligation to "take all practical measures to ensure that their nationals and vessels flying their flag refrain from engaging in any activity directed at underwater cultural heritage in a manner inconsistent with the Rules in the Annex"[96] was too onerous a burden and reflects some States anxiety over its ability to control nationals who are not in its territory.[97] As such, it was proposed that reference to a State's nationals should be deleted. An alternative mechanism for reducing the onerous duty on States under article 7 was proposed, which would limit the extent of the State's duty rather than limit the objects of this duty. Therefore, the phrase 'all practical measures' has been introduced to replace the phrase' all such measures as may be necessary', as the latter phrase was considered by many State to be an obligations of

---

[90] Levi uses the following as examples of vague terms in conventions, 'as far as possible', 'as appropriate to a state's needs', 'subject to national laws'. See Levi *op.cit* p.264

[91] CLT-96/CONF.202/5 Rev.2, article 3 p. 3

[92] *Ibid.* article 7 p.5

[93] *Ibid.* article 4 p.4

[94] These terms appear in square brackets as alternatives in the draft convention, or in State comments during negotiations, and will be discussed in relation to the subject matter of each article throughout the thesis. These terms appear in the draft convention (CLT-96/CONF.202/5 Rev.2) as follows; articles 4(2), 4bis and 10.

[95] Article 5 (Option 1) CLT-96/CONF.202/5 Rev.2 p.5

[96] Article 7(1), option 1 *Ibid* p.5. See similar wording in article 7(1), option 2 (without square brackets around 'their nationals and') p.6, and article 6, option 3 p.8.

[97] Canada, in particular, argued that such an obligation would be too onerous.

resolve which placed too onerous a burden on States. Similarly the phrase 'refrain from engaging in' replaces the phrase 'to ensure they do not engage in' for the same reasons.

These proposals would greatly undermine the effectiveness of the convention, and substantially minimise State obligations to preserve UCH in international law. The suggestion that flag State jurisdiction would provide a sufficient basis for a preservation regime in areas beyond territorial jurisdiction is undermined by the existence of 'flags of convenience' and by the fact that determining the flag State is not as simple a task as may be presumed.[98]. If this jurisdiction is the only form relied upon, it would be possible for one State to control all activities directed at UCH in those areas through flag registration of vessels whilst not becoming a party to a UNESCO convention[99]. To require the State to merely take 'all practical measures' would allow those developing State's with little or no policing abilities or national infrastructure to prevent nationals from engaging in illicit activities to effectively opt out of this aspect of the convention, placing the UCH under considerable risk. This is particularly so if this State offer flags of convenience.

State responsibility in international law does not extend to the actions of the nationals of a State. Article 11 of the ILC draft articles states that 'the conduct of a person or a group of persons not acting on behalf of the State shall be not considered as an act of the state under international law"[100], and therefore the State cannot be responsible for these acts. The obligation of a State, however, could be to ensure that its nationals do not engage in such activities. As such, if a national did engage in these activities the State would be responsible, not for the activity as such, but for not preventing the national from undertaking such an activity. This onerous obligation is unlikely to be accepted by States, and therefore a 'softer' obligation might be required in order to obtain a convention. This may be the obligation to establish national legislation that would subject its nationals, who did engage in activities directed at UCH inconsistent with the Rules in the Annex, to penalties. It is thus the obligation to take action against its own nationals which is being required of State parties. This, it is submitted is not too onerous a burden on States.

Conclusion

The 'softening' of the provisions of the draft convention have a number of important advantages in the case of highly politicised negotiations. It allows for differentiation between States with different levels of resources, allowing for States to ratify the convention more easily than would otherwise be the case if the State had to implement national legislation to give effect to mandatory requirements. It also allows States discretion when implementing the provisions of the convention which may result in constitutional inconsistencies had the provision been couched in normative terms. Most importantly, it serves as a base for reaching consensus, which may ultimately be more effective as a preservation regime.

---

[98] For a more detailed discussion of this point, see Dromgoole, S and Gaskell, N., "Interests in Wreck: Part I" 2(2) *Art, Antiquity and Law (1997) p.106*

[99] It is interesting to note that the two States most closely associated with the deletion of this term are Australia and Canada, both of whom support the extension of coastal State jurisdiction in accordance with article 5. Thus, while the regimes suggested by these States might provide a protective regime in the EEZ and CS that would be effective under their national administration, it will fail to provide as effective a regime beyond these areas

[100] The ILC draft articles can be found at *http://www.law.cam.ac.uk/rcil/ILCSR/Arts.htm#A11*

It is anticipated that in order to obtain a convention from these negotiations, many of the provisions may be 'softened', not necessarily by couching the provisions in less normative terms, but by restricting the normative duty itself. Thus, it may be that while States will be required to impose sanctions for the importation of UCH recovered in a manner inconsistent with the Rules in the Annex, the nature of the sanctions will not be specified[101]. Similarly, it may be that while States are required to take all practical measures to ensure that vessels flying its flag do not engage in activities directed at UCH in a manner inconsistent with the Rules in the Annex, States will only have to make it an offence for their nationals to undertake similar activities.[102] States may also be required to take measures to seize UCH, rather than be duty bound to actually seize such UCH. Similarly, States "shall endeavour to co-operate" in the protection and management of UCH[103] and in the provision of training in underwater archaeology[104]. Judging from the comments of a number of States that advocate a strong normative preservation regime, it is anticipated that many States will give normative effect to these 'soft' provisions with regard to its territorial waters and to activities and person over which it has jurisdiction.

Co-operation, notification and collaboration

Article 303 of UNCLOS requires States to co-operate in the preservation of UCH. This international duty is the foundation upon which the UNESCO draft is based, and the duty to co-operate is evident in both the preamble[105] and inherent in the general principle articulated in article 3.[106] This duty of co-operation is given specific meaning in article 13, which requires States to consider collaborating in activities directed at UCH, as well as with regard to the sharing of information regarding seized UCH and the

---

101 See article 9 CLT-2000/CONF.201/8, Paris, 5 July 2000

102 See Canadian and Italian proposal regarding article 7, option 1 of the negotiating draft. CLT-2000/CONF.201/3, Paris, April 2000 pp.10-11

103 Article 12, CLT-2000/CONF.201/8, Paris, 5 July 2000

104 Article 15, *Ibid*

105 Para.6 of the preamble declares that "c-operation among States ... is essential for the protection of underwater cultural heritage," CLT-96/CONF.202/5 Rev.2, Paris, July 1999 p.1

106 While the duty to co-operate is inherent in article 3(1), it was proposed to make this duty explicit, which was included in square brackets as article 3(2). This proposal arose as a number of States wanted to introduce the principle of international co-operation as a specified general principle upon which the convention is based. Spain, for examples proposed the inclusion of the following additional paragraph which read; "[t]o that end, State Parties shall take all necessary measures to co-operate especially entering into or reinforcing existing co-operation agreements as to the rights and obligation mentioned in Article 303 of the UN Convention on the Law of the Sea" The Argentinean delegation argued that article 303 does not apply to all maritime areas and therefore reference to it is inappropriate. This delegation preferred to repeat article 303(1), which reads, "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose" (1999 Meeting). The US proposed a similar paragraph, which reads, "State Parties shall protect underwater cultural heritage and shall co-operate for that purpose in accordance with this convention" CLT-99/WS/8, Paris, April 1999 p. 24. Similarly, the Chinese delegation proposed a paragraph that reads, "State Parties shall preserve underwater cultural heritage through international co-operation for the benefit of mankind" CLT-99/WS/8, Paris, April 1999 p. 24. Although the Chilean delegation objected to the mandatory character of the Spanish proposal, it should be noted that the duty does not necessarily require co-operation, but only a duty to take all necessary measures to co-operate. This approach is also evident in article 13, which requires a State to consider collaborating with interested States. Article 13 of the first UNESCO draft reads; "[w]henever a State has expressed a patrimonial interest in particular underwater cultural heritage to another State Party, the latter *shall consider collaborating* in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage" (author's emphasis)

training and transfer of technology relating to UCH.[107] Given the difficulties of extending coastal State jurisdiction and the impasse created at the end of the second meeting, the UK delegation made a valuable proposal that concentrated on the areas of co-operation, notification and collaboration, that were generally non-contentious issues, and may prove to be fertile ground for achieving consensus.

The UK proposal is valuable in that it proposes a system that relies on the principles of nationality and flag State jurisdiction rather than on any extension of coastal State jurisdiction over maritime zones beyond the CZ. Thus, rather than requiring that finds on the CS or in the EEZ of a coastal State be reported directly to the coastal State, the UK proposed that the State of the national or flag vessel that finds or undertakes activities directed at UCH should require the reporting of UCH to that State.[108] The State of flag/nationality would then transmit the information to UNESCO and all other member States of the UN. Upon receiving this information, any State could then declare an interest in the UCH, which would entitle that State to participate in consultations as to how the UCH would be preserved and to collaborate in any activities directed at UCH.[109] The coastal State would have no exclusive jurisdiction to regulate activities on its CS or EEZ with regard to UCH. However, as the coastal State already has exclusive jurisdiction with regard to the exploitation of the natural resources of these zones, and given the fact that activities directed at UCH often results in the disturbance of the natural resources of this zone, a number of States have called for greater powers for the coastal State.[110] As such, the Chairman of the working group during the 2000 meeting made a tentative proposal which would grant the coastal State "a special responsibility for the co-ordination of activities directed at the underwater cultural heritage and for the protection of any discoveries made in its exclusive economic zone or on its continental shelf."[111] The co-ordinating State would then enter into consultation with interested States as to how the UCH would be preserved. The State of nationality or of the flag of the persons who have found the UCH or proposed to undertake activities directed at UCH would have the exclusive jurisdiction to ensure that the activities were undertaken in accordance with the Rules in the Annex.

---

[107] Articles 13, 11, 12 and 16 respectively. CLT-96/CONF.202/5 Rev.2, Paris, July 1999

[108] Article XX(1) proposed by the UK reads; "[t]he State Parties shall require, in accordance with their national laws, that all discoveries of objects or sites of underwater cultural heritage, in areas under their sovereignty, or in the course of activities under their jurisdiction, are reported to them." CLT-2000/CONF.201/3, Paris, April 2000 p.22

[109] The remaining sections of article XX read as follows; "(2). In accordance with article 303 of the Convention, the State parties shall notify UNESCO of discoveries reported under paragraph 1. Where the object or site is discovered in another State, the State parties shall also notify that State. (3) The State parties shall co-operate with UNESCO to ensure that the information notified under paragraph 2 is circulated promptly to all Member States of the United Nations and to all States Parties to this Convention. On receipt of such information, any State may declare an interest in the underwater cultural heritage concerning and its wish to be included in any consultations on how to ensure the effective protection of that underwater cultural heritage. Such a declaration shall not in itself constitute a basis for the assertion of any preferential rights with respect to the underwater cultural heritage concerned. (4). The State Parties shall co-operate to ensure that any State which declares an interest under paragraph 3 is included in such consultations." CLT-2000/CONF.201/3, Paris, April 2000 p.11. For an amended version of this article, which improves on the wording, though not the substance, see CLT-2000/CONF.201/9, Paris, 7 July 2000, WG.1/WP.15, Paris, 5 July 2000

[110] The US for example, proposed that the State of nationality of a flag vessel be required to inform the coastal State of any planned activities directed at UCH within its EEZ or CS so that the coastal State can ensure that these activities do not interfere with its activities with regard to the exploration and exploitation of the natural resource of these zones. Comments of the US on selected articles considered in group one, Paris, 4 July 2000

[111] CLT-2000/CONF.201/9, Paris, 7 July 2000, Annex. 3

Emerging is a system which requires the State of the nationality or of the flag of vessels which may undertake activities directed at UCH, to ensure that these activities are conducted in accordance with the Rules of the Annex. However, as these activities can take place great distances away from this State, and given the fact that the coastal State has the policing and surveillance capabilities in its EEZ and CS, the coastal State may be granted powers to ensure that the UCH is preserved. These powers are not exclusive, but determined in co-operation with the State of flag/nationality.

While these proposals have not been subjected to extensive discussion or negotiation, it is anticipated that consensus may be found in this area. A resulting convention based on these proposals will not, however, provide as effective a regime as would have been adopted had the secretariat draft of UNESCO obtained broad consensus. The disadvantages of such a system are obvious, yet may be the only basis upon which consensus might be reached and is preferable to the void which currently exists. The effectiveness of this anticipated convention is undermined by the complex and possibly time-consuming nature of the co-operative arrangements that would have to be concluded between States in order to preserve UCH. Coastal States would have limited powers with regard to UCH on their CS and would have to co-operate with the flag State of the vessels or the State of the nationals in order to ensure that the recovery is undertaken in accordance with the Rules of the Annex. The use of flags of convenience, and the fact that nationals may not return to their State of nationality for extended periods exacerbate these difficulties. As such, enforcement of the provisions of the draft may prove to be difficult. These are necessary consequences of the opposition by a number of States to extended coastal State jurisdiction. Underpinning this opposition, and the problems of enforcement on the high seas, are the principles of sovereignty and jurisdiction in international law. These contemporary principles govern the manner in which the preservation regime can be structured. These principles are, however, under pressure to evolve in international law. With the possible evolution of these principles comes the possibility of structuring the UNESCO draft on principles that might strengthen the preservation regime. Such possibilities will be considered in chapter 6.

Multiple value recognition

The value of cultural heritage is not absolute, but relative to competing values. The extent to which interests in cultural heritage must accommodate other interests, and often bow to these interests, is evident in a number of international instruments. Reichelt states that the international legal instruments protecting cultural property were premised on a dual purpose, firstly to provide some measures of protection for cultural heritage, but also to preserve the continued international art trade.[112] This suggests that the preservation of cultural heritage must be ensured within a commercial trade context. Thus, while cultural heritage may be of economic value, it may play a larger part in the package of commodities negotiated under international trade treaties.

Conflict between economic development and the protection of cultural property is the subject matter of the 1968 UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public and Private Works. Although it seeks to achieve a balance between these competing interests, it is clear that only in exceptional circumstances will the cultural heritage interest

[112] Reichelt *op.cit* p.67

prevail. Thus, cultural heritage may, at times have to bow to the interest of national or international development. Similarly, the 1954 Hague Convention recognises the overriding value of military necessity. Thus, the protection of cultural heritage, and the value attributed to it, may have to bow to other values.

While these overriding values ordinarily impinge upon the physical integrity of the cultural heritage, or its part as an individual piece in a collection, other values may still be accommodated. Article 5(3)(c) of the 1995 UNIDROIT Convention indicates the value of cultural heritage in terms of the information that it can provide rather than its commercial value. Thus, in requesting the restitution of cultural heritage illegally exported, the requesting State or individual need only prove that through its non-return, either the integrity of a complex object, the preservation of information or the traditional or ritual use of the object by a tribal or indigenous community will be impaired. This reflects the recognition that it is the informational value of the cultural heritage that is of primary importance. It is therefore seldom that all the attributed values of the cultural heritage will be sacrificed in the interest of an overriding value.

As was discussed in chapter 1, the incentive to draft a convention on the preservation of UCH in international waters is a direct result of the development of the conflict between the realisation of its archaeological and economic values. Thus, the exclusion of any commercial incentive to recover UCH is an important policy object of the 'purist' sector of the archaeological community, and often discussed as if it were a fundamental principle upon which the preservation regime is based. To this extent, the negotiations of this draft have been an attempt to resolve this conflict in favour of non-commercial exploitation of UCH, which is clearly unacceptable to a number of maritime States, particularly the US and UK. If the objective of UNESCO is to obtain a convention which is both practically enforceable and broadly accepted, it must be conceded that this conflict in values will not be realised in this manner, and the UNESCO draft will have to adopt a regime which recognises multiple values attributable to UCH. As such, the preservation regime will be based on the principle that it is possible to achieve the preservation of the archaeological value of UCH without eliminating other user groups of the value they attribute to UCH. The negotiating draft convention provides a system that requires persons undertaking activities directed at UCH to do so in a manner consistent with the Rules of the Annex[113] that may be achievable even though commercial incentives to recover UCH are maintained. It is anticipated that a draft convention will therefore recognise multiple values in the UCH, and may be based partly on the US proposal that non-commercial exploitation be included as a provision of the convention, but subject to the declaration of a reservation allowing States not to apply that provision if they so wish.

Conclusion

It is anticipated that a convention may result from this process. Such a convention will be based on the one area on which consensus is clearly evident: that UCH should be preserved through the application of appropriate scientific techniques to any activity directed at it. While the application of these rules will be discretionary within areas under the exclusive sovereignty of States, it is envisaged that States will be required to take all possible measures to do so, and that a great majority of States will indeed do so.

---

[113] Bar Rule 2, which could be deleted or amended without undermining the other provisions of the Annex.

In areas outside the exclusive maritime zones of a State, States will be required to put into place national legislation which requires both its nationals and vessels flying its flag to undertake activities directed at UCH in a manner which conforms with the Rules in the Annex. In order to ensure that UCH in these areas are preserved, and that activities directed at UCH are conducted in a manner that benefits humankind, the principle of State co-operation and collaboration will be applicable. The functioning of this system will be based on the power of States to regulate the importation of UCH brought into its territory; to seize illicitly recovered UCH brought into its territory; to impose sanctions for such importation and to dispose of the UCH in manner which benefits humankind. An aspect of the convention that is difficult to anticipate relates to the introduction of a significance requirement in the definition of UCH. While the possibility of reducing the scope of the convention by the imposition of a significance requirement will undermine the effectiveness of this preservation regime, it may still be beneficial to all UCH as the application of such a regime to a limited category of UCH may elevate the value of the remaining categories by association, if not by law.

While this convention is clearly an improvement to the anarchy that prevails in international waters today, it clearly does not provide a basis for as effective a preservation regime as many would have wished. The success of the adoption of such a convention will, however, lie in the introduction of a number of principles that have hitherto not been applicable to UCH in international waters, and upon which the evolution of these principles will develop. The principle of State co-operation, the inclusion of UNESCO as a body within this preservation regime and the non-extension of coastal State jurisdiction beyond the CZ suggest the implementation of a global administrative system in international waters. Such a system would not rely solely on any one State's jurisdiction, but require a co-ordinated system of State participation. This system would give effect to the recognition of the UCH as having a universal character, and its preservation being for the benefit of humanity. Such a co-ordinated system also recognises that the benefits that can be realised from the preservation of UCH belongs to all humanity, and therefore that the burden for ensuring this preservation is the responsibility of all. As such, the co-ordinating system requires the transfer of technology and expertise in underwater archaeology and conservation to developing States.

These principles bear a strong resemblance to those that are advocated as constituting the concept of the common heritage of mankind in international law; a concept often associated with cultural heritage. Given the changing nature of sovereignty and jurisdiction in international law, and the extent to which the anticipated UNESCO draft is reliant on these principles, it may be that the principles contained in the anticipated UNESCO draft may evolve in the future. It is therefore worth considering whether these principle could be formulated in such a way that they could contribute to the development of a principle that would provide for a more effective preservation regime for UCH in the future. Such a consideration is undertaken in the following chapter.

Chapter 6

The Emerging Principles of International Law, the Common Heritage of Humankind and Cultural Heritage

International law and the UNESCO draft convention

Introduction

The drafting of a new international convention to preserve UCH is being undertaken at a time when international law is evolving[1]. Increasing powers of science and technology have led to developments that have put the world's natural and cultural heritage at considerable risk[2]. Existing international law paradigms are seen by some as being unable to cope with and overcome global economic, humanitarian and ecological problems[3]. Unilateral State action, rising from the political fragmentation of the world community and strong nationalistic sentiments has exacerbated these threats[4]. The inadequacies of the existing paradigm and the stirrings of evolutionary changes are evident in a number of principles of international law which are addressed in the UNESCO convention. In particular, the international law concepts of sovereignty, jurisdiction, State responsibility and State immunity are under pressure to change and adapt to new international circumstances.

The problem of the preservation of UCH requires both a sound conceptual basis and a coherent institutional response. With the changing nature of international sovereignty and jurisdiction comes the possibility of structuring a convention for the preservation of UCH on new principles. While cultural heritage in general has often been referred to as 'the common heritage of mankind' it is questionable whether this has any normative content in international law. However, the concept of the common heritage of mankind is based on a number of principles that could provide a sound framework for the construction of a preservation regime for UCH. The principles emerging from negotiations in UNESCO, upon which the anticipated convention will be based, bear a resemblance to those contained within the concept of the common heritage of mankind. As such, it may be that these principles could be developed so as to conform more closely with the principles that make up the concept of the common heritage of mankind. Given the changing nature of sovereignty and jurisdiction in international law, the possibility arises that these principles may continue to evolve to the extent that, at some time in the future, they may constitute a normative recognition of the concept of the common heritage of mankind. It is therefore worth the drafters of the UNESCO

---

[1] Khan, A., "The extinction of nation-states" 7(2) *American Journal of Law and Policy* (1992) p.199; Danilenko, G.M., *Law-Making in the International Community* (1993) Martinus Nijhoff p.xiii

[2] Global problems include environmental degradation, overfishing, the Green House effect, deforestation, Ozone depletion, AIDS, nuclearism, etc.

[3] Weiss, E.B., *In Fairness to Future Generations: International law, Common Patrimony and Intergenerational Equity* (1989) The United Nations University. p.xxv. See also Head, J.W., "Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of International Law" 42(3) *The University of Kansas law Review* (1994) pp.605-666; Khan *op.cit* pp.197–234; Allott, P., "Reconstituting Humanity – New International Law" 3 *European Journal of International Law* (1992) pp.219-252

[4] Postyshev, V., *The Concept of the Common Heritage of Mankind: From New Thinking to New Practise* (1990) Progress Publishers p.5

convention considering whether the provisions of the anticipated draft could be formulated in a way that provides the basis for a more effective preservation regime in the future and which could lay the groundwork for the recognition of principles that may be made applicable to general international cultural heritage law.

Sovereignty in international law

"At the threshold of the twenty-first-century, the concept of the state is subject to profound challenges"[5]. These changes are clearly evident in international human rights law, environmental law and economic law.

Contemporary international legal theory holds the State as the subject of international law.[6] This, together with the notion of territorial sovereignty, meant that consideration of the individual was excluded from the ambit of positive international law. This included questions of self-determination and human rights. The atrocities perpetrated in the 20th century have stimulated a new approach to sovereignty, limiting the exercise of State sovereignty by the recognition of peremptory norms of international law that cannot be derogated from[7]. The norms of international humanitarian law, found in both customary and conventional international law, have resulted in States' inability to hide behind the veil of sovereignty in the case of human rights abuses. Such a development is also evident in the recognition of *jus cogens* in the 1969 Vienna Convention on Treaties.[8]

The world is faced with pressing global environmental problems that threaten human development, welfare and survival. Environmental degradation transcends boundaries and an effective solution to these problems must be based on universal State participation.[9] No State should therefore be permitted to prevent such a global solution by using the concept of sovereignty and State consent as a veto.[10] Consent based international law has evolved as a result. Higgins states that "as notions of natural justice were replaced by consent, so consent has gradually been replaced by

---

[5] Hobe. S., "Global Challenges to Statehood: The Increasingly Important Role of Non-governmental Organizations" 5(1) *Indiana Journal of Global Legal Studies* (1997) dowloaded from *http://www.law.indiana.edu/gjls*

[6] Both customary and conventional international law holds the State as the subject on international law. Treaties such as the 1945 Charter of the United Nations, 1 U.N.T.S. xvi; 1933 Convention on the Rights and Duties of States, T.S. 881, 1948 Charter of the Organisation of American States 119 U.N.T.S 3; 1963 Charter of the Organisation of African Unity 2 I.L.M. 766 hold each State to be sovereign and equal, and declares the territorial sovereignty to be inviolable.

[7] See Henkin, L., *The Age of Rights* (1990) Columbia University Press p.1 and MacFarlane, L.L., *The theory and practise of human rights* (1985) Temple Smith, London p.5

[8] *Jus cogens* is defined as a peremptory norm of general international law. Although *jus cogens* is generally agreed to include genocide, slavery, war crimes and crimes against humanity, there still exists some uncertainty as to its possible scope and the manner in which *jus cogens* is constituted.

[9] Levi, W., *Contemporary International Law: A Concise Introduction* 2nd ed. (1991) Westview Press p.261

[10] This is, however, precisely what a number of States have done. Both the Stockholm Declaration 1972 and the Rio Declaration 1992 affirm the principle of the Permanent Sovereignty over Natural Resources. This, for example, allows the Brazilian Government to declare that the Amazon is subject to the PSNR principle and that any attempt to internationalise this resource would be regarded as "an unacceptable aggression upon the principle of self-determination and sovereignty of nations." Baslar, K., *The Concept of the Common Heritage of Mankind in International Law* (1998) Martinus Nijhoff Publishers p. 131

consensus."[11] Such an approach is evident in the Hague Declaration on the Environment[12], in which States pledged that unanimous agreement is not to be sought in the fight against global warming.[13]

Increasing economic interdependence between States necessitates a re-examination of the concept of sovereignty. Economic interdependence effects all States and limits the extent to which a State can claim to be completely independent and sovereign and all actions of the State can be viewed in terms of its economic relations with other States. This economic interdependence is evident in the growing tendency for States to participate in regional economic fora, such as the European Union. Membership of such a forum can only be achieved through the relinquishment of a certain amount of sovereignty[14]. Global economic problems such as falling commodity prices, economic recession, developing States' debts and reduced markets in developing States require global solutions which can only be achieved if States are able to recognise the extent of their economic interdependence and adopt policies which are not based entirely on self-interest. Similarly, economic activities such as those undertaken by multinationals and e-commerce transcend traditional State boundaries.[15] Environmental and economic interdependence are also inextricably intertwined. Economic activity in one State may effect the environment to such an extent that the effects are felt in other States[16]. State sovereignty fosters policies of self-interest that too often are globally detrimental, necessitating a reorientation of the concept.

An aspect of this reorientation is the growing emphasis on the international community as a distinct entity in international law which "may develop interests of its own as distinct from the interest of its member States".[17] Baslar, for example, argues that the international community[18] "is gaining a *sui generis* legal status distinct from its constituting nuclei: states."[19]. Similarly, Ago declares that "a trend towards incipient personification of the international community" is emerging.[20] The recognition of the international community as a distinct entity in international law, and capable of international law-making negates the concept of State consent as a prerequisite of law-making. Thus, it is argued, peremptory norms can be established by the international community that binds all States, but does not require all States to consent to be bound[21]. As such, a State's dissent to a particular norm may be overridden by the collective will of the international community. This allows for the development of new sources of

---

[11] Higgins. R., *Problems and Process: International Law and How We Use It* (1994) Clarendon Press p.16

[12] 11 March 1989; 28 I.L.M 1308

[13] Baslar *op.cit* p.357

[14] See Generally Craig, P and De Búrca, G *EU Law: Texts, Cases and Materials* 2nd edition (1998) Oxford University Press pp.163-212

[15] Booysen, H., "International law as legal system: the quest and the need for a private-law leg" (*http://home.yebo.co.za/~interlegal/private-leg.htm*)

[16] See for example *The Trial Smelter Arbitration (US v Canada)* 3 RIAA (1941)

[17] Danilenko, G.M., *Law-Making in the International Community* (1993) Martinus Nijhoff p.195

[18] Traditionally, the international community has consisted of States. However, international organisations have emerged as possessors of international personality and may be regarded as members of the international community. For a discussion on the existence on such an international community, and reference to such a community in various conventions, see Danilenko *op.cit* p.12. It should be noted, however, that under the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986, U.N Doc A/Conf.129/15 (1986) it is only States which are capable of establishing or recognising peremptory norms of international law.

[19] Baslar *op.cit* p.75

[20] Ago, R "Third report on State Responsibility" 2 *Yearbook of International Law Commission* (1971) p. 211 as quoted in Danilenko *op.cit* p.195

[21] *Ibid.* p.199

international law other than those as specified in article 38 of the Statute of the International Court of Justice. This may include UN General Assembly Resolutions[22], *jus cogens* and other 'formless' expressions of community consensus.[23] While the recognition of the international community as a distinct entity in international law has yet to receive substantial support amongst States, the mere fact that these assertions have been made suggests a need for reform in international law to meet increasing global threats. The recognition of the international community as distinct from the constituent States suggests that the nature of this entity is greater than the sum of all States, and capable of having a distinct character. An aspect of this distinctiveness is the recognition of a universal culture as being more than the sum of the world's individual cultures, but rather as a single culture to which each individual culture contributes. The international community may be considered to represent all humankind.

The international community, however, may be difficult to define. While it may appear to relate to the UN General Assembly, as the body that represents more States than any other, the fact that the structure is based on States as the subject of international law undermines its utility. It has therefore been suggested that an alternative body should be created which represents humankind.[24] This is clearly an unrealistic option at the present stage of evolution in international law. The principle of international personality will require re-examination before humankind can really be endowed with enforceable rights and duties. It must therefore be conceded that States will, for the time being, act as trustee for humankind, and are impressed with an international obligation to act in accordance with this duty even though it may not be enforceable. Weiss, for example, argues that "since States are continuing entities, they represent past, present and future generations"[25] and as such, are required to act as trustee for these generations of humankind. Recognition of this will entail States acting in the interest of all humankind, and not simply in the interests of their own citizens. Thus, the notion of humankind may still have important consequences in international law; in particular, the recognition of humankind as being more than the sum of the citizens of each State entails the recognition of a universal cultural. It is therefore axiomatic that the material evidence of this universal culture should belong to all humankind.

Jurisdiction in international law

The changing conception of sovereignty is no more clearly evident than in the changing nature of State jurisdiction. The principle of sovereignty is based on territoriality so that each state has exclusive sovereignty over that territory and non-exclusive jurisdiction

---

[22] Positivist legal theory holds that UN General Assembly resolutions have no legal authority. It has, however, been suggested that such resolutions may amount to *opinio juris* of States, and therefore, if State practise is in conformity with this *opinio juris*, the resolution may amount to customary international law, recognised as a source of international law in s38(1) of the Statute of the International Court of Justice. Similarly, some attempts have been made to see UN General Assembly resolutions as constituting general principles of law recognised as a source of international law in s38(1). Baslar argues that even if it is not accepted that UN General Assembly Resolution can be a source of international law, current developments hint at an evolutionary process that may, in the future, lead to such a conclusion. Baslar *op.cit* pp.359-362

[23] By formless, it is meant that the manner in which the community consensus is expressed does not comply with those forms specified in article 38 of the Statute of the International Court of Justice. see Danilenko *op.cit* pp.200-202

[24] Baslar *op.cit* p.77

[25] Weiss *op.cit* p.48

over nationals. Jurisdiction is not, however, as clear-cut a principle as might be expected.[26] 'Effects jurisdiction'[27], for example, upon which the US basis a number of anti-trust legislation, has been extremely controversial.[28] The traditional bases for jurisdiction[29], although not free from controversy, have been found inadequate to deal with emerging problems of international law, particularly in relation to transnational economic activities and in relation to cyberspace[30]. This has led to a call for "a refinement of the concept of sovereignty in international law, so that it can accommodate both notions of the independence of States and of the increasing interdependence of States, without losing its coherence as a legal principle."[31]

While alternative bases of jurisdiction are controversial and ill defined, they have developed in scope in recent years. International law and non-legal political methods no longer regard the territorial sovereignty of a State as a veil to conceal human rights abuses, environmental degradation and threats to international peace and security, and the international community more readily imposes itself in the internal affairs of a State. The increasing interdependence between States has resulted in actions of one State having effects felt in another, not only economically, the arena in which the effects principle of jurisdiction is most developed, but in physical terms too, where global environmental degradation affects all States. This is particularly true in the case of the sea, where currents and winds drive marine pollution to the shores of any number of coastal States. It is therefore axiomatic that such development in international jurisdiction should be reflected in the law of the sea. As such, the jurisdictional regime that is to underpin a convention on the preservation of the UCH should take these developments into account.

In his insightful article, "Mare Nostrum: A New International Law of the Sea", Allott argues that UNCLOS, is an "actualisation of well-known conceptual structures, but it contains within itself the potential negation of those structures and hence the potentiality of a structural new law of the sea."[32] This restructuring is necessary in order for the international law of the sea to adjust to developments in international jurisdiction and international society. Allott therefore proposes that UNCLOS needs to be considered in a new light, ignoring the traditional conceptual structure on which the Law of the Sea is based and

---

[26] See for example Higgins, R., "Allocating Competence: Jurisdiction" in *General Course on Public International Law* (1993) pp. 89-114, in which Professor Higgins discusses the aspect of the principle of jurisdiction which is "not yet clear, what is controversial, what is uncertain..."; See also generally Reisman, W.M., (ed) *Jurisdiction in International Law* (1999) Ashgate Dartmouth

[27] First formulated in *United States v. Aluminium Co. of America*, 148 F. 2d 416 (1945).

[28] The UK, for example, have insisted that the exercise of jurisdiction based on the 'effects principle' is simply unlawful under international law. Higgins (1993) *op.cit* p. 111. See also Lowe, A.V., "Blocking extraterritorial jurisdiction: The British Protection of Trading Interests Act, 1980 " 75 *American Journal of International Law* (1981) pp.257-282 and Lowenfeld, A., "Sovereignty, Jurisdiction and reasonableness: A Reply to A.V.Lowe" 75 *American Journal of International Law* (1981) pp.629-638. Such extraterritorial jurisdiction in anti-trusts cases are not, however, limited to the US. See for example Gerber, D.J., "The Extraterritorial application of the German Antitrust Laws" 77 *American Journal of International Law* (1983) pp.756-783

[29] Namely the territorial principle, the nationality principle, the protective principle and the passive personality principle.

[30] Burnstein, M.R., "Conflicts on the Net: Choice of Law in Transnational Cyberspace" 29 *Vanderbilt Journal of International Law* (1996) pp.71-116; Johnson, D.R and Post, D., "Law and Borders - The Rise of Law in Cyberspace" 48 *Stanford law Review* (1996) pp.1367-1402; Reidenberg, J.R., "Governing Networks and Cyberspace Rule-Making 45 *Emory Law Journal* (1996) pp.911-930

[31] Lowe *op.cit* pp.281

[32] Allot, P., "Mare Nostrum: A New International Law of the Sea" 86 *American Journal of International Law* (1992) pp764-787

reconsider the philosophy of the law of the Sea. Part of this reconsideration is to view the jurisdictional regimes created under UNCLOS as functional rather than assimilations to territorial jurisdiction. Unfortunately, most States have shown a tendency to view jurisdictional problems in the law of the sea in terms of territoriality. One of the most common objections State parties have had to the allocation of jurisdiction to control UCH to the coastal State, is that it amounts to 'creeping jurisdiction'. By this it is meant that the coastal State is effectively extending its jurisdiction over greater territorial areas and that there is an increasing assimilation between these maritime zones and the territorial sea, and perhaps even the land territory of a State. The objection from States to this extension is based on the importance these States hold for the limitation of territorial jurisdiction of coastal States and the freedom of the high seas. Inherent in this argument is the conceptual structuring of the law of the sea as territorial in nature. This, however, is not an accurate reflection of the structure of the law of the sea. The struggle for the use of the sea from the seventeenth century onwards emanated from the economic and security needs of territorially defined States. From the conflicting interest between competing States, the theoretical framework that evolved was a mix between territorial sovereignty and functional jurisdiction. The resulting regime of the territorial sea was therefore "neither all-power nor all-freedom". This conceptual structure set the law of the sea aside from that which pertained to land. This mix persists under the UNCLOS regime, in which every maritime zone is a mix between territorial jurisdiction and functional jurisdiction, including the territorial sea with the limitations of territorial jurisdiction imposed by the concept of innocent passage. The developments of the CS regime and the introduction of the EEZ in UNCLOS may, at first sight, appear to be assimilations to a territorial regime, though are in fact limited to functional jurisdictional regimes. While these regimes are delimited by distances relational to geographical phenomena, they are not geographical phenomena themselves, but international legal regimes. Thus, to consider the extension of coastal State jurisdiction over the CS or EEZ is not to impose new jurisdictional rights and duties of States over a territorial area, but rather to alter the rights and duties that are ascribed to an existing international legal regime. That is, to alter the functional regimes ascribed to various States.

Given the increasing interdependence between States, particularly in environmental terms, it is necessary for the jurisdictional structuring of the law of the sea to be viewed in functional terms. This would not only reflect development in international jurisdiction, but also allow a more integrated response to global concerns. This would include the threat to the UCH. The concept of the freedom of the seas is increasingly anomalous and in order for the regime of the seas to develop in conformity with changing patterns of international jurisdiction it is necessary to view the law of the sea in terms of functional jurisdictions. A new regime for the preservation of UCH should therefore avoid the use of any jurisdictional structure that promotes territorial conceptions of jurisdiction, but should rather be based on a structure of functional jurisdiction that promotes an interdependent response to the function of preservation. While States have therefore opposed the extension of coastal State jurisdiction as a form of creeping jurisdiction, the granting of jurisdiction to an international organisation with responsibility in areas beyond coastal State jurisdiction cannot be viewed in such terms, and may be the basis for a preservation regime in these areas. The emergence of the principle of co-operation and the provisions of the UNESCO draft convention concerning co-operation, notification and collaboration with regard to UCH in international waters may prove to be fertile ground for such a development.

It is apt that the concept of the common heritage of mankind as applied to UCH should be considered in the first instance in terms of the law of the sea, as it originated in this context with regard to the deep seabed mining regime. The concept was described by Ambassador J. Alan Beesley QC as "a concept quite possibly the greatest of any principle or ideal which will emerge from this conference."[33] This concept was not, however, made applicable to UCH in UNCLOS.[34] However, the concept may be applicable to UCH through its evolutionary development in cultural heritage law. The application of the principles of the concept of the common heritage of mankind to UCH is therefore based on the nature of UCH rather than of the environment in which it is found

The Common heritage of mankind

Introduction

There is a pressing need for an interdependent response to the threats to the world natural and cultural heritage. However, as is evident from the proceedings of the UNESCO meetings to consider the adoption of an international convention, a number of principles of contemporary international law prevent such an interdependent response to this problem. What is required in order to overcome this impasse is the consideration of alternative principles upon which to base this regime. This section will argue that the concept of the common heritage of mankind, and its constituent principles of 'intergenerational equity' and trusteeship, can provide the conceptual framework within which a practical response could be formulated.

The concept of the common heritage of mankind

Arguably, the concept[35] of the common heritage of mankind has been the cause for more academic debate than any other emerging concept in international law[36]. The notion of the concept of the common heritage of mankind emerged in

---

[33] Goldie, L. F. E., "A note on some diverse meanings of 'The common heritage of mankind'" 10 *Syracuse Journal of International Law and Commerce* (1983) p.69

[34] It may be noted that although the debate over the meaning of the common heritage of mankind was primarily waged between the United States and the Group of 77, a third interpretation of the concept was advocated by Ambassador Arvid Pardo, who is accredited as having introduced the concept of the common heritage of mankind to the Convention. Pardo envisaged the concept to be a guiding principle for the Law of the Sea negotiations and a basis for introducing a new regime to replace customary international law principle of the freedom of the High Seas. He stated that "[t]he object of the Maltese proposal was to replace the principle of freedom of the high seas by the principle of common heritage of mankind in order to preserve the greatest part of ocean space as a commons accessible to the international community. The commons of the high seas, however, would be no longer open to the whims of the users and exploiters, it would be internationally administered." (Goldie *op.cit* p.86) This definition has a wider scope than that of the Group of 77, in that it envisages the entire sea and its resources as the common heritage of mankind, rather than just the resources of the deep seabed. Had this vision of the common heritage of mankind been applied, UCH would undoubtedly be regarded as the common heritage of mankind. See also Korthals Altes, A., "Submarine Antiquities: A Legal Labyrinth" 7 *Syracuse Journal of International Law and Commerce* (1976) p. 82 for a discussion on the attempt of Greece and Turkey to apply the concept of the common heritage of mankind to UCH in UNCLOS.

[35] For an explanation on the use of the term 'concept' to describe the phenomenon of the common heritage of mankind, see Baslar *op.cit* pp.4-7

[36] Joyner has described the concept as 'an emerging politico-legal concept in international law'. See Joyner, C.C., "Legal Implications of the Concept of the Common Heritage of Mankind" 35 *International*

international legal considerations in the context of the law of the sea[37] and outer space in the 1960's and 1970's[38]. Its development took place against the backdrop of the Cold War and the development of the now defunct concept of the New Economic International Order. It is therefore not surprising that against this backdrop, it was not possible to define and determine the legal status of this concept. The concept consists of a number of constituent elements, some of which have been used in various international regimes and which have been equated with the concept itself. The concept therefore tended to mean different things in different contexts. By the mid 1980's the general view regarding the status of the concept can best be summed up in the words of Joyner who stated that "[a]s yet the common heritage of mankind is not a principle of international law *erga omnes*. The common heritage of mankind today is neither the product of "instant custom" nor *jus cogens*. Rather it is merely a philosophical notion with potential to emerge and crystallise as a legal norm."[39]

The world order of the 1990's and 2000's is markedly different to that in which the concept of the common heritage of mankind was conceived. The increasing interdependence between States and the decline in the principles of sovereignty and territoriality have provided a more fertile ground for the development of the concept. This has led to a reconsideration of the status of this concept. Most recently, Baslar has attempted to reformulate the concept in such a way that it can acquire normative status. In order to achieve this, he developed a conceptual framework for the evolution of the concept. This conceptual framework, he states, "will ripen in the years, if not decades ahead" and "is likely to elevate the concept's legal status from a political level to a binding principle of international

---

and Comparative Law Quarterly Jan.(1986) p.199. On the common heritage of mankind generally, see Ciciriello, M. C., "The Principle of the Common Heritage if Mankind and it's Application in Contemporary International Law: Results of a Research" 2(2) *University of Rome, Dept of Public Law* (1982) pp.609-613; Danilenko, G. M., The Concept of the Common Heritage of Mankind in International Law XIII *Annals of Air and Space Law* (1988) pp.247-265; Gorove, S., "The concept of the common heritage of mankind" 9 *San Diego Law Review* (1970) pp.390-403; Kiss, A.C., "Conserving the common heritage of mankind" 59(4) *Revista Juridica University Puerto Rico* (1990) pp.773-777: Larschan, B. and Brennan, B. C., "The Common Heritage of Mankind Principle in International Law" 21 *Colombian Journal of Transnational Law* (1983) pp.305-337; White, M. V., "The Common Heritage of Mankind: An Assessment" 14 *Case Western Reserve Journal of International Law* (1982) pp.509-542

[37] A great deal of literature exists for the development of the concept of the common heritage of mankind in the law of the sea. See, for example, Williams, S., *The International and National Protection of Movable Cultural Property. A Comparative Study* Oceana Publications, Inc (1978) p.59; Nordquist, M.H., *United Nation Convention on the Law of the Sea 1982: A Commentary* Vol. 1 (1985) Martinus Nijhoff Publishers: Goldie *op.cit* pp.69-112; Knight, G. and Chiu, H., *The International Law of the Sea* (1991) Elsevier Scientific Publishers; Postyshev *op.cit* p.43; Brown, E. D., "Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict" 20 *San Diego Law Review* (1983) pp.521-560; Clancy, E.A., "The Tragedy of the Global Commons" 5(2) *Indiana Journal of Global Legal Studies* (1997) downloaded from *http://www.law.indiana.edu/gjls*

[38] The modern origins of the use of the term 'common heritage of mankind' in international law is obscure. Most commentators have attributed the introduction of the term into international law to the Maltese Ambassador to the United Nations, Mr Arvid Pardo, during the negotiation on the Peaceful Uses of the Seabed and the Ocean Floor beyond the limits of National Jurisdiction in 1967 (U.N.Doc A/6695, 18 August 1967 p.2). However, the Argentinean Ambassador, Aldo Armando Cocca claims to have first introduced the term in 1954 with reference to outer space and that the first time it was introduced in international law was by the UN Committee on Outer Space in 1967, shortly before the Deep seabed committee meeting. (U.N.Doc A/AC.105/c.2/SR.216); See Postyshev *op.cit* p.33

[39] Joyner *op.cit* p. 199. For further discussion on the normative nature of the concept of the common heritage of mankind, see also Ervin, S., "Law in Vacuum: The Common Heritage Doctrine in Outer Space Law" 7 *Boston College International and Comparative law Review* (1984) p.424; Suter, K., *Antarctica: Private Property or Public Heritage?* Zed Books, London, (1991)

law."[40] What is illuminating is the extent to which the principles emerging from the UNESCO negotiations resemble those proposed by Baslar.

An analysis of the concept of the common heritage of mankind

The concept of the common heritage of mankind has been advocated in a number of different areas of international law, in particular the deep seabed, the moon[41], outer space[42], Antarctica[43], the geostationary orbit, the environment[44] and technology.[45] Technology has been described as "the archetypal common heritage of mankind since it is the expression of man's spirit, his boldness and his conquests, of the advance of science and human knowledge over the centuries and beyond state boundaries."[46] It stands to reason that the material manifestations of the development and history of technology should similarly fall within the range of objects regarded as the common heritage of mankind.

It is not surprising that the advocation of the application of this concept to such diverse range of subject matter has entailed the legal content of this concept being the topic of protracted and heated debate. At the core of this debate, is the exact meaning of the terms used in the phrase, 'common heritage of mankind'.

The notion of 'commonness' is at the root of the legal uncertainties surrounding the entire notion of the concept of the common heritage of mankind. While it is beyond the scope of this thesis to consider the long and protracted debates concerning this notion of commonness[47], it is necessary to briefly consider the original notion of commonness in the development of the concept of the common heritage of mankind and to propose a contemporary meaning. The concept of the common heritage of mankind evolved within the context of international spaces, such as the deep seabed and outer space. It was thus inextricably linked with the concepts of territoriality and the sovereignty of States. State sovereignty over territory allows the State to determine questions of

---

[40] Baslar *op.cit* p.370

[41] For example, 1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 U.N.T.S. 205 declares; "[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic and scientific development, and shall be the province of all mankind."

[42] For example, in the Declaration of Legal Principles Governing the Activities of States in the Exploration and Exploitation of Outer Space A/Res/1962 (XVII); 1963, 3 I.L.M 157; it is stated: (1) the exploration and use of outer space shall be carried out for the benefit of and in the interests of all mankind; (2) outer space and celestial bodies are free for exploration and use by all states on a basis of equality and in accordance with international law; (3) outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." See further, Williams *op.cit* p.57.

[43] See, for example, Lefeber, R., "The Exercise of Jurisdiction in the Antarctic region and the Changing Structure of International Law" XXI *Netherlands Yearbook of International Law* (1990) pp.81-137

[44] The concept of the common heritage of mankind is evident in the 1972 United Nations Declaration on the Human Environment that states; "[t]he non-renewable resources of the earth must be employed in such a way as to guard against the dangers of their future exhaustion and to ensure that the benefits from such employment are shared by all mankind." See further, Goldie *op.cit* p.87; Joyner *op.cit* p.190; Postyshev *op.cit* p.20

[45] Goldie *op.cit* p.87 ;Joyner *op.cit* p.190

[46] Postyshev *op.cit* p.46

[47] For a more detailed discussion on this topic, see Baslar *op.cit* pp.38-61;

ownership and, as such, the notion of commonness has therefore been associated with the concept of ownership. In particular, it has been associated with the roman law concept of *res omnium communes*; which means that the property cannot be appropriated by anyone, but is available for all to use.[48] As the concept of the common heritage of mankind has evolved and has been proposed for application in other contexts, such as in endangered species, the environment, technology and biodiversity, so the limitations inherent in the concept of ownership have become evident. There are two reasons for this. Firstly, the notion of commonness in terms of ownership does not extend itself to application in the context of natural or cultural resources that exist within the territory of a State[49]. Few States would concede sovereignty over these cultural and natural resources and vest sovereignty and ownership in an entity other that the State. It is submitted that as the concepts of sovereignty and territoriality are evolving in international law, it is possible that, at some point in the future, this may be possible. Secondly, the concept of ownership does not reflect the essence of the notion of commonness in contemporary international law. The development of the notion has been grounded in concerns over elements that are of concern to all humankind. The essence of the notion is that all humankind should have their interest expressed and that no State's individual interests should predominate. These common interests pertained to issues that were not limited by territoriality, such as environmental degradation and climate change. If the common heritage of mankind concept is to be applied in these contexts, it cannot be based on territoriality, and must therefore be viewed as a functional concept. As such the common heritage of mankind " is not necessarily concerned with the ownership of the area where resources are found, but with the use of the resources for the benefit of mankind."[50] As a functional concept, the concept of the common heritage of mankind is concerned with international resources management and the notion of commonness should be viewed in terms of trusteeship and management participation rather than ownership[51]. Such commonness is reflected in the UNESCO draft convention in that the preamble recognises that UCH should be preserved for the benefit of humankind and, with the elimination of the concept of abandonment in the draft, will be preserved irrespective of ownership.

Originally the notion of heritage was interpreted within the context of *res omnium communes*, and therefore inherent in this notion was the concept of ownership being passed from one legal entity to another. This property based approach leads to a number of difficulties associated with joint ownership and the transfer of property[52]. This includes the determination of who the original owner was, how the original owners actually acquired this ownership and

---

[48] Weiss *op.cit*, p.194. Alternatives, such as *res communis humanitatis*, have also been suggested. The exact nature of this concept is unclear, though it appears to be distinct from the concept of *res omnium communes* in that it vests ownership of international spaces, such as the deep seabed, in mankind itself. It is , however, still grounded in the concept of ownership.

[49] Baslar *op.cit* p.38

[50] *Ibid* p.349

[51] In relation to cultural heritage, Warren has stated that the problems regarding the illicit traffic in cultural heritage should be regarded as "one of preservation... and not one of ownership." See Warren. K.J., "A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press p.22. Similarly, Williams argues that the application of the concept of the common heritage of mankind "must be seen in terms of preservation and protection." Williams *op.cit* p.55

[52] For a detailed discussion on these possible problems, see Baslar *op.cit* pp.61-65

ensuring consensus among current owners as to how the property should devolve to the next owner. If one no longer interprets the concept of the common heritage of mankind as pertaining to ownership, but rather to a functional regime, then the inheritance pertains to an inheritance of management functions. This function is passed from one generation to another, each generation acting as trustee of the subject of the common heritage. While heritage refers to the inheritance of a functional trusteeship, there is a great deal of uncertainty as to the subject of this heritage. While international spaces, such as the deep seabed and outer space are generally considered to be subjects of the common heritage of mankind, other areas such as the environment, cultural resources, technology, the geostationary orbit and biodiversity are more controversial subjects.

The notion of humankind as the recipient of rights and duties can be traced back to the dawn of civilisation and is mentioned in numerous religious and philosophical texts.[53] In international law, the use of the term can be traced as far back as 1832, when the sea was described as the 'undivided heritage of mankind'.[54] The use of the term in contemporary international law is associated with the increasing influence of natural law theory and the development of international humanitarian law and is used in numerous international treaties.[55] Its content is, however, unclear. It has been interpreted in a positive legal framework to mean 'all States', while in a natural law context it may pertain to all human beings including future generations. Recognition of the latter entails the acknowledgement that humankind is capable of having rights and duties in international law. Referring to the rights of future generations, as a component of mankind, Weiss states that the enforcement of these rights "is appropriately done by a guardian or representative of future generations as a group, not of future individuals, who are of necessity indeterminate. The fact that the holder of the right lacks standing to bring grievances forward and hence must depend upon the decision of the representative to do so does not effect the existence of the right or the obligation associated with it."[56] This may apply not only to rights of future generations, but to humankind as a whole. As such, although humankind is not a subject of international law, and may not enforce rights some consider it to have, the concept of trusteeship may be applied to States as acting on behalf of humanity.

Cultural heritage as the common heritage of mankind

The preservation of cultural heritage has received some consideration at an international level during the past half century[57]. It is apparent, however, that these conventions and recommendations have been adopted on a piecemeal basis, reacting to specific needs rather than providing a framework within which all cultural heritage may be preserved and managed. There are, however, a number of common features that

---

[53] Galloway, J., "Political Philosophy and the common heritage of mankind concept in International Law" in *Proceedings of the 23rd Colloquium on the Law of Outer Space* (1980) p.25; Postyshev *op.cit* p.37

[54] *Ibid* p.48

[55] See for example the Preamble to the 1945 Charter of the United Nations; 1959 Antarctic Treaty 402 U.N.T.S. 71; 1972 Stockholm Declaration; 1973 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243; Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 U.N.T.S 205; UNCLOS.

[56] Weiss *op.cit* p.97

[57] See Appendix VII

appear in many of these conventions and agreements that may be utilised in the creation of a framework for the preservation of UCH. These common features will be considered within the context of proposing the application of the principles of the concept of the the common heritage of mankind to the preservation of UCH.

The concept of the common heritage of mankind has not only been important with reference to those areas beyond national jurisdiction, but has also been important in the way in which the cultural heritage is perceived. The destruction of monuments and works of art during the wars of the twentieth century was inextricably linked with cultural nationalism. However, the shifting of national borders and the discovery of archaeological remains unconnected with any contemporary nation spawned the growing recognition of the cultural heritage as the legacy of humankind. The destruction prompted States and international organisations to investigate means of preserving the world's cultural heritage. This interdependent response needed to preserve the cultural heritage instilled the view of cultural heritage not existing purely within the national sphere, but rather internationally and being the universal heritage of all humankind[58]. So, for example, the attempted codification of the international law of war as it related to cultural heritage under the auspices of the League of Nations recognised monuments and works of art, not as national heritage, but as the universal heritage *that was in need of protection* for the benefit of humankind as a whole.[59] This notion was further clarified in a study undertaken by the International Council of Museums in 1939, in which it was declared that 'states that are rich artistically are only depositories of such works for the general benefit of all mankind'.[60] Thus, a new perception of the cultural heritage "as a component of a common human culture, whatever their places of origin or present location, independent of property rights and national jurisdiction" evolved.[61]

In 1945, Brazil proposed that the UN Charter should contain a clause recognising culture as the common heritage of humankind, and to create an international organ to maintain co-operation in the preservation of the cultural heritage. Although this proposal was not accepted, the theory behind it became the basis for the formation of UNESCO. The creation of UNESCO as an international organisation with the mandate to preserve cultural heritage is itself an embodiment of this universalism[62], and is evident in the Constitution of UNESCO, which requires the organisation to maintain, increase and diffuse knowledge "by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommendations to the nations concerned the necessary international conventions."[63]

A great number of international and regional conventions and agreements have contained terms that describe the cultural heritage as that of all humankind. The recognition of cultural heritage as having universal importance was first established in the 1954 Hague Convention when it affirmed that "damage to cultural property

---

[58] Williams *op.cit* p.54
[59] Toman, J., *The Protection of Cultural Property in the Event of Armed Conflict* (1996) Dartmouth/UNESCO Publishing p.19
[60] Williams *op.cit* p.53
[61] Merryman, J.R., "Two ways of thinking about cultural property" 80 *The American Journal of International Law* (1986) p.831
[62] Postyshev *op.cit* p.51
[63] Article 1(2)(c) UNESCO Constitution U.N.T.S vol. 4, pp.276 *et seq.*

belonging to any people whatsoever means damage to the cultural heritage of all mankind since each people makes its contribution to the culture of the world".[64] It thus introduced into international law the notion that the cultural heritage is of general importance to all humankind, irrespective of where that cultural heritage is situated.[65] This recognition established a conceptual basis for subsequent UNESCO conventions[66]. The World Heritage Convention states that "parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole"[67]. The UNESCO Recommendation Concerning the International Exchange of Cultural Property[68] contains the statement "[b]earing in mind that all cultural property forms part of the common heritage of mankind ..."[69]. The preamble to the 1985 European draft convention on the UCH acknowledges "the importance of the UCH as an integral part of the cultural heritage of mankind and a significant element in the history of the peoples and their mutual relations". The 1966 Declaration of the Principles of International Cultural Co-operation states that "[i]n their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind".[70]

While many international conventions and agreements describe the cultural heritage as that of all humankind, their aim is to 'protect' this heritage through the enforcement of retention policies of a State. The 1970 UNESCO Convention is based on the perception of the cultural heritage as having a distinct 'national' character, and its aim is to prevent the loss of a nation's cultural heritage due to illicit international trade. Many nations rich in art and archaeological artefacts are economically poor[71], while the economically rich developed countries such as the US, Japan, Germany and France have a demand for cultural heritage items for investment purposes which exceeds domestic supply. Most source States rigorously oppose the export of their cultural heritage and many are party to the 1970 convention. Market States, however, do not particularly have an interest in preventing cultural heritage from entering their jurisdiction, especially if they constitute investment items, and consequently few have become parties to the convention, the exceptions being the US and Canada. The underlying rationale for market States to sign the treaty is based on the realisation that the cultural heritage is of particular importance to the State from which it originates. Article 2 of the Convention states;

> "The state parties to this convention recognise that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property"

In protecting the cultural heritage in its territory, each State has to designate those that are to be subject to export restrictions. This therefore allows source States extensive

---

[64] Reichelt, G., "International Protection of Cultural Property" 1 *Uniform Law Review* (1985) p.51
[65] Merryman *op.cit* p.841
[66] Mulvaney, J., "A Question of Values: Museums and Cultural Property" in McBryde, I., (ed) *Who Owns the Past?* (1985) Oxford University Press p.89
[67] See also article 6, World Heritage Convention, which states that "State Parties to this Convention recognise that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate"
[68] 26 November 1976 UNESCO Doc IV.B.8
[69] Merryman *op.cit* p.837
[70] Strati, A., *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) Martinus Nijhoff Publishers p.8
[71] These include, Egypt, Mexico, Greece, India, Guatemala and Nepal. For a discussion on the illicit excavation and export of cultural heritage form the latter, which typifies the situation in many of these States, see Sassoon, D., "Considering the Perspective of the Victim: The Antiquities of Nepal" in " in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.61-72

powers to define the cultural heritage that will be subject to trade restrictions and has the effect of creating a strong nationalistic control of the cultural heritage. This nationalistic approach to cultural heritage is also evident in the 'repatriation' movement, which calls for the return of cultural heritage to States from which it was removed as a result of plunder, by colonial powers[72], theft, illicit export or exploitation.[73] Under the auspices of UNESCO and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, a number of recommendations and resolutions have been adopted, stepping up the pace of the repatriation movement. The use of the convention to attempt to prevent clandestine excavations that lose archaeological data has allowed source nations to follow a policy of retention of the cultural heritage.

Merryman persuasively argues that 'retentive nationalism', as evidences in the 1970 UNESCO Convention, dominates the international law relating to cultural heritage.[74] The UN General Assembly and UNESCO, the international organs most likely to advocate cultural internationalism, are dominated by nations dedicated to retention and repatriation.[75] Writers such as Strati also advocate a nationalistic approach, stating that "cultural objects which reveal the specific national features of original civilisations should belong to the people who created them. If they are no longer accessible to those who created them, provision should be taken for their restitution or return to the State(s) of origin."[76]

While it is therefore undeniable that source States have a right to retain and claim the return of cultural heritage which may be of national importance, it does not necessarily mean that they have absolute control over national heritage that may also be internationally important. So for example, while the 1970 UNESCO Convention advocates national retention, the preamble suggests that each State may have an international obligation to "protect the cultural property existing within its territory against the dangers of theft, clandestine excavation and illicit export". Reichelt therefore argues that the 1970 UNESCO Convention in fact does enshrine the concept of a common heritage of all mankind as "its purpose is the safeguard and respect of cultural property as part of the universal cultural heritage...".[77] The reverse is also true, as exemplified in the 1954 Hague convention which, though introducing the notion of a common heritage, contains retentive policy measures.[78] The 1956 UNESCO Recommendations[79] and the 1968 Recommendations both endorse the policy of retaining archaeological heritage in the State in which it is excavated, whilst recognising its importance to humankind, as does the 1995 UNIDROIT Convention. A dual interest is therefore recognisable

---

[72] For example, the return of the Elgin marbles to Greece by the UK

[73] Merryman *op.cit* p.845

[74] *Ibid* pp. 845-853

[75] *Ibid* p.850

[76] Strati, *op.cit* p.8

[77] See Reichelt *op.cit* p.53. Monden and Wils, however, do not agree with this assertion and argue that the 1954 Hague Convention does not introduce the concept of a common heritage of humankind. See Monden, A and Wils, G ., "Art objects as Common Heritage of Mankind" XIX *Revue Belge de Droit International* (1986) p.329

[78] For example, although the 1954 Hague Convention introduced the notion of 'cultural internationalism' or 'the common heritage of all humankind', the Regulations for the Execution of the Protection of Cultural Property in the Event of Armed Conflict, and the Protocol and three Resolutions adopted by the International Conference at the same time as the 1954 Convention, evidences a more nationalistic approach, as it requires each contracting party to prevent the exportation of cultural heritage from occupied territories.

[79] Article 23(b) 1956 Recommendations

in this cultural heritage. Within this recognition of dual interests, with the primary interest in the State of origin, lies the inherent responsibility of that State to preserve the cultural heritage for those with a secondary interest. It is thus inherent in this scheme that the State of origin act as trustee on behalf of a wider beneficiary, humankind. This idea of trusteeship is, for example, evident in the 1972 UNESCO Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage which imposes on each State "an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations." It is similarly evident in the 1978 UNESCO Recommendation for the Protection of Movable Property which declares that; "movable cultural property representing the different cultures forms part of the common heritage and that every State is therefore responsible to the international community as a whole for it's safeguarding". Similarly, the 1985 European draft convention on the UCH states that the "moral responsibility for protecting the UCH rests with the State directly concerned but that, as this heritage is common to mankind as a whole, such protection is also the concern of all states."

While these international and national conventions and agreements contain the term 'common heritage of mankind' and purport to introduce the concept of a regime under which States hold the cultural heritage as trustee, it is not certain what obligations this imposes upon States in international law. Certainly, other subject matter, such as the environment, weather and the world itself have also been described as the common heritage of mankind. There has been a considerable amount of disagreement as to what this actually means in international law, and the general conclusion reached is that these terms are nothing more than non-binding political statements or statements of aspirations. In terms of the cultural heritage convention, only the 1972 World heritage convention incorporates any of the principles of the concept of the common heritage of mankind, though it too falls short of actually applying the concept of the common heritage of mankind.[80] Nevertheless, a number of commentators on the international regimes preserving UCH regard it as the common heritage of humankind. Both Blake[81] and Strati regard UCH in international waters as the common heritage of mankind[82]. Williams states that "it is obvious that the drafters and state parties to these Conventions [1954 Hague Convention, 1970 UNESCO Convention and 1972 World Heritage Convention] have considered this concept [concept of the common heritage of mankind] and accepted it as fundamental to the notion of protection."[83] Williams does, however, concede that the application of the concept, as it evolved in the context of the deep seabed and outer space, in the context of cultural heritage does pose a number of problems and that it is more an ideal that an actual application of the concept. Baslar argues that though cultural heritage has been

---

[80] See Baslar *op.cit* pp.300-304

[81] Blake contends that article 149 does encompass the concept of the common heritage of mankind. She states that "the problematic expression of the common heritage of mankind as encapsulated in article 149 remains the only application of this doctrine [concept of the common heritage of mankind] to archaeological remains located beyond the contiguous zone." Blake, J.A., *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts with Special Reference to Turkey* PhD Thesis, University of Dundee (1996) p.310. See also Tanner-Kaplash, S., *The Common Heritage of All Mankind: A Study of Cultural Policy and Legislation Pertinent to Cultural Objects* (1989) Unpublished PhD Thesis, University of Leicester

[82] Strati, A., "Deep Seabed Cultural Heritage and the Common Heritage of Mankind" 40 *International and Commercial Law Quarterly* (1991) p.893

[83] Williams *op.cit* p. 54. Monden and Wils argue that from this point of view, the 1954 Convention does not amount to a claim of the common heritage of mankind but rather strengthens the national cultural heritage argument. Monden and Wils *op.cit* pp.327-338.

described as the common heritage of mankind, the definition of that term was so amorphous in this context that no legal certainty could be derived from its use. However, having proposed the principles of the concept of the common heritage of mankind that could acquire normative status in international law, he continues to reject the application of the concept to cultural heritage in general.[84] He does, however, concede that in relation to immovable cultural or natural heritage, as envisaged in the 1972 World Heritage Convention, the concept of the common heritage of mankind could be applicable.[85] While it may be true that in terms of the current development of international law, the application of the concept of the common heritage of mankind to all UCH may confuse the attempt to obtain recognition of the normative status of the concept in other spheres, it does not suggest that UCH cannot ever be subject to this concept.

The UNESCO draft convention does not refer to the UCH as the common heritage of mankind, but rather as "an integral part of the cultural heritage of humanity"[86] that shall be preserved "for the benefit of humankind." These terms clearly do not introduce the concept of the common heritage of mankind, and the uncertainties regarding their interpretation amount to nothing more useful than moral statements. This is true for all the UNESCO conventions that refer to similar terms. Yet, it is clear that the dangers posed to UCH are the common concern of humankind and require an interdependent response. Thus, this thesis argues that the development of an adequate preservation regime for UCH could be developed on the basis of a number of principles of the concept of the common heritage of mankind, and that it may be possible for the concept in its entirety to evolve to the extent that it may be applied to UCH in the future.

The Principles embodied in the common heritage of mankind

The development of the concept of the common heritage of mankind in the 1960's and 1970's, in the context of the law of the sea and the law of outer space centred on a number of core principles.[87] These were expounded by Pardo in the context of the Deep seabed to include: (a) non appropriation of the deep seabed; (b) the establishment of an international regime to manage deep seabed mining; (c) the peaceful use of the area[88], and (d) the equitable sharing of benefits derived from the deep seabed. While these principles have generally been accepted in the context of the law of the sea and the law of outer space, they require

---

[84] Baslar *op.cit* p.298

[85] *Ibid* p.302

[86] Preamble to the Negotiating draft.. CLT-96/CONF.202/5 rev.2 p.1

[87] Weiss *op.cit* pp.191-192

[88] The principle of peaceful use of the common heritage was originally considered in terms of the common heritage of mankind as applied to the deep seabed. As the conception of the concept of the common heritage of mankind took place against the backdrop of the Cold War, military concerns were of the utmost importance. Baslar contests the inclusion of this principle as a constituent element of the concept of the common heritage of mankind on the grounds that the principle is one of general international law relating to international spaces. This principle, which was conceived and applied before the conception of the common heritage of mankind, "is an independent undisputed *jus cogens* and *sui generis* principle of *corpus iuris spatialis*." For example, the principle of peaceful use of international spaces was included in the UN Convention on the Peaceful Uses of Outer Space, Article IV, which states that "[t[he moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes." This principle therefore has no application in terms of its application to UCH. Baslar *op.cit* p.106.

reorientation in order to apply them in other contexts and to take into account the present development of international law.

The principle of non-exclusive use

Originally, the concept of the common heritage of mankind was viewed in terms of non-appropriation of international spaces. However the principle of non-appropriation, particularly in the context of the law of the sea, is not a constituent element of the concept of the common heritage of mankind but rather a general principle of international law, and more particularly of the *corpus iuris spatialis*.[89] This principle of non-appropriation is also inextricably linked to the notion of commonness as a proprietary concept, linked as it has been to territoriality. As indicated above, the concept of the common heritage of mankind should not be viewed as a territorial function, but rather in terms of a functional regime. The principle of non-appropriation would also prevent the application of this concept to natural and cultural resources situated in the territory of a State. Where States claim sovereignty over these resources in their territory, the concept of the common heritage of mankind should not impinge on this claim, though it should regulate the manner in which those resources are managed so as to benefit humankind. Thus, while the principle of non-appropriation may not apply, the principle of non-exclusive use should be applied. This may be reflected in the principle of trusteeship. As such, the sovereign State may continue to claim ownership rights over these resources, but subject to the international duties of trusteeship, which entails the assurance that these resources are to be used non-exclusively, so as to benefit present and future generations.

With the application of the principle of non-exclusive use, rather than non-appropriation, questions of ownership of UCH, whether within a State's territory or beyond its jurisdiction, need not be considered. The ownership of UCH will therefore not necessarily be subject to any form of communal ownership and the application of this principle must necessarily be viewed in terms of preservation rather than any form of communal ownership.[90] So, for example, it may be that although a State or private individual is deemed the legal owners of UCH, the international community may be regarded as beneficial owners of the cultural heritage. The legal owners are akin to trustees who must administer their property with due regard to the ultimate beneficiaries, humankind.

While numerous conventions and recommendations adopted to preserve cultural heritage have regarded the common heritage of mankind concept in terms of imposing a custodial obligation on States rather than as a challenge to any States property rights, they have not allowed for any intervention into domestic affairs dealing with cultural property within a State's national territories.[91] There is therefore a need for the imposition of an internationally binding State obligation to apply and respect the principle of no-exclusive use. This can only be achieved if the concepts of State sovereignty are allowed to evolve so that a State cannot regard this sovereignty as a mechanism for unilateral use of UCH within its territory. While this may be difficult to achieve at this stage of the evolutionary

[89] Baslar *op.cit* p.86-89
[90] Williams *op.cit* p.55
[91] *Ibid* p.55

development in international law, a step in this direction can be taken in regard to recognising the principle of planetary administration of UCH.

The principle of planetary administration

The notion that international spaces should be managed by an international administrative regime has been a core aspect of the concept of the common heritage of mankind since its inception. This was considered necessary in order to represent humankind and to prevent exclusive use of the areas. In the context of the law of the sea and the law of outer space, international administrative bodies have been formed.[92] Similarly, in terms of cultural resources situated within the territory of States, the World Heritage Authority has been constituted in order to provide some protection of the World's most important natural and cultural resources. It has been suggested that the common heritage of humankind, in all its manifestations, should be administered by one central authority, rather than through a number of different authorities each established to administer one common heritage.[93] This, however, is unlikely to gain support in the current evolutionary stage of international law.

The principle of planetary administration and underwater cultural heritage

The concept of planetary administration of UCH found in areas beyond coastal State jurisdiction was originally proposed during UNCLOS III[94]. In 1968 the Seabed Committee was convened to establish an international authority with jurisdiction over the seabed and ocean floor beyond the limits of national jurisdiction, which would regulate, co-ordinate, supervise and control all activities relating to the exploration and exploitation of the seabed resources.[95] In 1970, the Secretary-General submitted a report to the Seabed committee entitled 'the Potential Role of the International Machinery to be Established[96]', in which it was suggested that "the exploration and recovery of sunken ships and lost objects" could be foreseen as a use of the seabed. The report also stated that although "wrecks, relics and lost objects lying on the seabed are not resources or at least not natural resources, ... they may fall under the jurisdiction of the machinery if the recovery of lost objects is regarded as another use of the seabed." This is reflected in an article in the 1970 draft convention which provided that the ISBA would have the power to "designate as marine parks and preserve specific portions of the International Seabed Area that have unusual educational, scientific or recreational value"[97]. This initiative

---

[92] The ISBA was established in the UNCLOS and an international regime was created in the Moon Treaty.

[93] See Baslar *op.cit* p.94-96. See also Weiss *op.cit* p.113 who proposes the establishment of Planetary Rights Commissioners who would have global jurisdiction to receive complaints regarding the non-fulfilment of right to which mankind is vested. This could include rights acquired under the common heritage of mankind regime.

[94] Commentators in the 1970's also recognised the need for an international body. Korthals Altes recognised the possible value of establishing such a body, though he also recognised the opposition States may have to it. As such he also suggested that, though not administrating the protection of UCH, the establishment of such a body would at least "promote the exchange of data and information, and preferably an international fund to subsidise the salvage of unique antiquities." Korthals Altes *op.cit* p. 95. The latter point serves to illustrate the possible application of the principle of benefit and burden sharing.

[95] 25 U.N. GAOR Supp (No21). See also Barrowman, E., " The Recovery of Shipwrecks in International Waters" *8 Michigan Yearbook of International Law* (1987) p.234

[96] Doc.A/AC.183/23, 25 UN GAOR Supp. No. 21 (A/8021)

[97] Article 25, U.N. Doc A/AC.138/25 (1970) as quoted in Korthals Altes *op.cit* p. 82.

was supplemented by proposals form the Greek delegation in 1971[98] and the Turkish delegation in 1973.[99], that envisaged the preservation of UCH being regulated by the ISBA.[100] However, in 1976, the conference chose not to confer on the ISBA any power regarding UCH and any reference to the authority in what was to become article 149 was deleted.[101]. The ISBA's powers were restricted to matters of resource exploration and exploitation, and deep-water archaeological operations were excluded from the definition of 'activities in the area'.[102] The exclusion of the ISBA's power in relation to article 149 makes this article particularly ineffective and prone to interpretational problems, as it was originally intended that the ISBA would have the power to regulate the activities and therefore to interpret the article in its regulations[103]. While it is difficult to ascertain why these changes were made, as the conference intentionally kept no records of the delegates' deliberations in making changes to the drafts[104], it is clear that a number of maritime States wished to limit the powers of the ISBA, thereby preserving as much as possible the principle of freedom of the seas and the sovereignty of States.

---

[98] A/AC.138/S.C.I/L.16; See also Strati *op.cit* pp. 296 - 297 for a summary of the Greek proposal

[99] A/AC.138/SC.I/L.21; See also Strati *op.cit* pp. 297 - 298 for a summary of the Turkish proposal

[100] In the committee's report in 1971, following the Greek proposals, it was stated, "[b]esides the functions and powers referred to above, consideration may also be given to functions and powers relating to other uses of the sea-bed. While it is difficult to foresee all the other possible uses of the sea-bed which technological progress should bring about, reference may be made to the use of the sea-bed for the following purposes, each of which may be accompanied by the performance of related functions and powers by international machinery. Exploration and recovery of sunken ships and lost objects both from the point of view of archaeology - with regard to which UNESCO performs a variety of functions- and as regards salvage operations." A/AC.138/23

[101] Article 20, which would later becomes article 149, read;"(A) 1. Particular regard being paid to the preferential rights of [the State of (sic) country of][the State of cultural][the State of historical and archaeological] origin, all objects of an archaeological and historical nature found in the Area shall be preserved [or disposed of by the Authority] for the benefit of the international community as a whole. [2. The recovery and disposal of wrecks and their contents more than [fifty] years old found in the Area shall be subject to regulation by the authority without prejudice to the rights of the owner thereof.] or (B) Omit this provision. (UNCLOS OR art 163, U.N. Doc. A/CONF.621 C.I/L.3 (1974). This article was later amended, and renumbered article 19, which read; "1. All objects of an archaeological or historical nature found in the Area shall be preserved or disposed of by the Authority for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the State of (sic) country of origin, or the State of cultural origin, or the State of historical and archaeological origin. 2. The recovery and disposal of wrecks and their contents more than 50 years old found in the Area shall be subject to regulation by the authority without prejudice to the rights of the owner thereof. 3. Any dispute with regard to the preferential right under paragraph 1 or a right of ownership under paragraph 2, shall, on the application of either party, be subject to the procedure for settlement of disputes provided for in the convention. (UNCLOS OR (Informal Single Negotiating Text) at 137, 6 U.N. Doc A/CONF.62/WP.8/PART I (1975)

[102] Article 1(3) of UNCLOS states that Activities in the area are all activities of exploration and exploitation of the resources of the area. The resources of the area are defined in article 133(b) as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed including pollymetallic nodules."

[103] Strati argues that though the ISBA's jurisdiction is limited to resources matters, there is nothing in UNCLOS preventing the ISBA from exercising some control over UCH found on the seabed as an expression of the duty created in article 303(1). This is naturally based on Strati's conclusion that article 303(1) is applicable to the 'Area'. See Strati *op.cit* p.312

[104] The chairperson of the drafting committee stated; "[i]n order to ensure that the consideration of the drafting changes not give rise to substantive implications or interpretative records, the Committee and its organs have followed the practise of avoiding records of discussions of drafting changes and the reason therefore." 15 UNCLOS OR (Report of the Chairman of the Drafting Committee) at 146 U.N.Doc A/CONF.62/L.67/Rev.1 (1981); See also Newton, C. F., "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention" 10 *Hastings International and Comparative Law Review* (1986) p.177

While the ISBA is not considered appropriate to undertake this task, UNESCO, it is submitted, is.[105] The recognition of the preservation of UCH as a common concern of mankind, and the evolutionary changes to sovereignty in international law may pave the way for such a development. While it will be more problematic to extend such an administrative regime to UCH found within State's territories, it is certainly possible to sow the seeds of such a planetary administrative regime by providing for one that will cover all UCH beyond coastal State jurisdiction.

The principle of benefit and burden sharing

The development of the concept of the common heritage of mankind owes much to the economic interest of the developing world, which viewed the concept as a solution to the disparities existing between the developed and developing world.[106] It was therefore suggested that "revenue sharing or equitable distribution of natural resources is one of the *sine qua non* elements of the common heritage concept."[107] Not only was the common heritage viewed in terms of economic benefits, but also these benefits were to be derived from its exploitation. The developed world, however, never had the opportunity to share in the exploitation of the international spaces such as the deep seabed and Moon as no economic mining has ever been undertaken. With the collapse of the concept of the New International Economic Order, and the growing awareness of the threat of global environmental degradation, the principle of benefit sharing came under close scrutiny. In the context of the environment and cultural heritage, it was observed that the benefit that should be shared is humankind's continued utilisation in terms of non-economic benefits such as sustainable development and shared cultural and aesthetic values. These, however, entail considerable costs. Baslar therefore suggests that "benefit and burden-sharing be understood as congenitally twin elements of the common heritage."[108] Reorientation of this principle allows for the improved implementation of the principles of trusteeship and intergenerational equity. It is therefore proposed that a constituent element of the concept of the common heritage of mankind should be the equitable sharing of both the benefits and burdens of the common heritage.

In chapter 1, the values, and therefore benefits, embodied in UCH were considered. It was concluded that the archaeological and historical information that can be derived from UCH is of the utmost importance, though not the only benefit that can be derived from the physical preservation of UCH. It is, however, the preservation of the UCH that is the aim of the UNESCO draft convention. From the physical preservation of UCH, a number of other benefits can be derived, including economic benefits. The primary benefit that humankind draws from this physical preservation is knowledge, and it is that which should be at the centre of the UNESCO convention and its preservation regime. The archaeological investigation, excavation and recovery or *in situ* preservation can be extremely costly. All humankind will benefit from the knowledge

[105] When considering the UNESCO draft convention, Shuzhong suggested that an international organisation for the protection of UCH is needed. See Shuzhong, H., What Kind of Underwater Convention Do We Need? " 8(2) *International Journal of Cultural Property* (1999) p.576.
[106] See Payoyo, P.B., *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (1997) Martinus Nijhoff Publishers
[107] Baslar *op.cit* p.97
[108] *Ibid* p.100

derived from UCH and should therefore bear the burden of ensuring that the UCH is preserved. However, humankind is, in a sense, only the secondary beneficiary of the utilisation of UCH. Others, such as the State in which the UCH is found which may derive tourist revenue therefrom, or those individuals who derive economic benefit from the recovery of UCH, receive the primary benefit. It should be incumbent upon these to share the burden that accompanies the benefit of their use of UCH. This may include the transfer of technology and expertise in conservation and underwater archaeology with developing States as well as entering into collaborative arrangements with regard to excavations. The task of ensuring that both the benefits and burdens are shared rests in the planetary administrator of UCH, UNESCO.

The principle of sustainable development

The application of the concept of the common heritage of mankind to globally significant natural and cultural heritage entails the application of the principle of sustainable development, which anticipates consideration for the interests of future generations[109]. Such a principle finds further expression in the concept of trusteeship and intergenerational equity, and has been defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[110] This principle is therefore dependent on the preservation principles discussed in chapter 1, which are based on the concept of intergenerational equity[111]. This concept holds that "that each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations."[112] Essentially the concept of intergenerational equity has been explained within the context of preserving the world's natural heritage, and ensuring that the planet is able to sustain life, at the same quality for each successive generation. The concept is, however, particularly suited to application in the related context of cultural heritage, as it is the quintessential example of the relationship between generations. It can thus be used to argue that the world's cultural heritage resource base is a non-renewable resource that should be conserved for future generations.

The concept of intergenerational equity is based on the premise that all men hold the world's natural and cultural heritage as both beneficiaries of its fruits and as trustee for future generations.[113] It is therefore widely recognised that each

---

[109] A number of international agreements and declarations require application of the principle of sustainable development. For example, the 1982 World Charter for Nature G.A.Res. 37/7, U.N. Doc A/37/51; 1981 World Soil Charter, U.N.Doc C/81/27; 1968 African Convention on the Conservation of Nature and Natural Resources, 1001 U.N.T.S. 3. See further Weiss op.cit p.50 note 12 and p.39

[110] World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Oxford, 1987 p.43 as quoted in Baslar *op.cit* p.104

[111] For amore detailed discussion on the meaning of equity in international law, see Weiss *op.cit* pp.34-38; Higgins *op.cit* pp.219-237

[112] Weiss *op.cit* p.2. Implicit in the principle of intergenerational equity is the notion of intragenerational equity. As such, the holders of the world's natural and cultural heritage act as trustees for other members of the present generation as well as for future generations. Thus the holder of natural or cultural heritage is both a trustee for present and future generations, and a beneficiary as a member of the present generation.

[113] This philosophy is evident in a number of the world's religions and in the works of leading philosophers such as Locke, Rawls and Marx. For example, the Judeo-Christian tradition holds that God gave the earth to man as an everlasting possession, to be used for his enjoyment, and to be preserved for the enjoyment of the next generation. (Weiss *op.cit* p.19. See also pp.19-21 for examples of other religions incorporation of this concept) In a similar vein, Marx stated that "no

generation has a moral obligation to take care of the natural and cultural heritage so that future generations may benefit as much as the current generation.[114] This ethical obligation has been alluded to in a number of international conventions.[115] There has, however, been no international law mechanism that can automatically transform this moral obligation into legally enforceable norms. The consideration of the rights of unborn generations to the world's natural and cultural heritage requires the introduction of a temporal dimension to international law, which to date, has always related the present to the past.[116] The recognition of the normative status of the concept of the common heritage of mankind in international law would therefore introduce such a concept. However, until such time as this occurs, the principle of trusteeship should prevail.

The Common Concern of Mankind

The most innovative element of Baslar's reorientation of the concept of the common heritage of mankind is the introduction of a new constituent element, the principle of the common concern of mankind. Baslar's thesis is to re-orientate the concept of the common heritage of mankind in order to ensure that it is capable of acquiring peremptory normative status in international law. He recognises that the concept has been proposed as appertaining to a wide variety of subject matter, from the deep seabed and outer space to the cultural heritage, biodiversity and technology. Baslar determines the principles of the concept of the common heritage of mankind in order to establish a framework within which the concept can gain normative status in international law. The scope of the application of the concept is therefore narrow. For this reason, in the context of natural and cultural heritage, he restricts the application of the concept to only that which can be considered the common concern of mankind. Baslar therefore contends that it should only apply to "that which globally affect the survival and welfare of mankind."[117] He therefore concludes that;[118]

"While the living and non-living resources of international spaces beyond national jurisdiction *ipso facto* and *ab initio* should be controlled by way of a planetary administration, the aesthetic, cultural, historical, ecological resources situated under national jurisdiction should be regarded as common heritages of all mankind provided that they are of 'vital global importance' or 'common concern of mankind'."

---

nation, nor all the nations covering the globe are owners of the land, but merely possessors, tenants, with responsibilities like diligent heads of families, of transmitting it, improved, to future generations".(Galloway, J., "Political Philosophy and the common heritage of mankind concept in International Law" in *Proceedings of the 23rd Colloquium on the Law of Outer Space* 1980 p.26)

[114] Weiss *op.cit* p.17

[115] This concept of protecting the natural or cultural heritage for future generations was also included in the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, T.I.A.S No 8165; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243 and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151. Article 4 of the latter convention, for example, states; "[e]ach State Party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission *to future generations* of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."(Own emphasis)

[116] For a more detailed discussion on the intertemporal doctrine see Weiss *op.cit* pp.28-34

[117] Baslar *op.cit* p.110

[118] *Ibid* p.111

This application of the concept is supported by Weiss, who states that "it should extend to all natural and cultural resources, wherever located, that are internationally important for the well-being of future generations."[119].

The introduction of this element has become necessary as the concept has been proposed for application to subject matter other than international spaces. It becomes difficult, however, to determine when the subject matter acquires sufficient 'vital global importance' to warrant application of the concept of the common heritage of mankind. Baslar suggests that an international administrative body be conceived in order to make these decisions. Thus, he argues that a limited application of the convention will allow for its recognition as a peremptory norm in international law, which will result in the creation of an international administrative authority. This authority could then widen the application of the concept to other subject matter if it consider that the subject matter is of vital global importance. He therefore rejects the general application of the concept to a number of possible subject matter, including cultural heritage, unless it can be considered the common concern of humankind, and argues that its general application and administration by appropriate international administrative authorities would weaken the application of the concept.

At the current stage of development in international law, it is submitted that it is unlikely that States would concede to the establishment of a Common Heritage Authority which would manage the common heritage and have the power to widen its scope of application by determining what subject matter is of vital global importance. It is also submitted that the concept of the common heritage of mankind is more likely to gain normative status through its continued and widespread application in a number of contexts and through administration of a number of international administrative authorities. It is therefore proposed that the constituent elements of the concept be used to create a framework for a regime to preserve the UCH under the auspices of UNESCO.

The structuring of a preservation regime based on the concept of common heritage of mankind

UNESCO's role in the preservation of cultural heritage

The negotiating draft provides for the assistance of UNESCO in article 17, stating that;[120]

"1. State Parties may call upon the UNESCO for technical assistance concerning underwater cultural heritage as regards information and education, consultation and expert advice, co-ordination and good offices, [or in connection with any [technical] problem arising out of the application of the present Convention or the Rules of the Annex.]

[2. The Organisation may, on its own initiative, conduct research and publish studies on matters relevant to the protection of the underwater cultural heritage.]

[3. The organisation shall inform State parties on activities directed at underwater cultural heritage.]"

---

[119] Weiss *op.cit* p.49

[120] CLT-96/CONF.202/5 Rev.2, Paris, July 1999. There was little discussion on article 17 at the 1998, 1999 or 2000 meeting of experts, as other matters dominated the agenda. It may, however, come under closer scrutiny at the fourth meeting of experts in early 2001.

Although the question of the ability to bind UNESCO to duties in such a convention is questionable, these duties do not envisage it taking a proactive central role in the preservation of UCH. It is suggested that its role could be made more proactive and central to the preservation of UCH , as is the case with regard to the preservation of cultural heritage preserved under the 1954 Hague Convention and the 1972 World Heritage Convention.

In 1982, The World Conference on Cultural Policies, concluded that "in a world torn by dissections which imperil the cultural values of the different civilisations, the member States and the Secretariat of the United Nations Educational, Scientific and Cultural Organisation must increase their efforts to preserve such values and take more intensive action to further the development of mankind. The establishment of a lasting peace is essential to the very existence of human culture."[121] This call for action on the part of UNESCO reflects the extent to which UNESCO fulfils a central role as the protector of the world cultural heritage. UNESCO, as an inter-governmental organisation, reflects the view of its member States, and cannot, therefore be totally independent. However, it is the body responsible for the preservation of the world's cultural inheritance, and its mandate has given it the ability to act in a proactive manner, by formulating recommendations, offering technical services, co-ordinating preservation initiatives, giving advise, and acting as a mediator in conflicts between member States[122]. This proactive role of UNESCO, particularly in acting on its own initiative, is evident during the negotiations of the 1954 Convention. The UK had objected to the ability of UNESCO to offer assistance to member States, as contained in article 23(1). The delegation felt that this could cause an embarrassment to the particular State and that UNESCO should therefore only offer assistance upon request. The UK objection was overruled, thus indicating the proactive nature of UNESCO's mandate.[123] This proactive nature is, however limited to that allowed by UNESCO's programme and budget approved by the member States. This has set a precedent, and subsequent conventions have retained UNESCO's ability to undertake research and make self-initiated proposals to States.[124]

Article 17 of the negotiating draft is almost identical to article 23 of the 1954 Hague Convention, which grants State Parties the right to call upon UNESCO for technical assistance in fulfilling their duties under the convention. The assistance given by UNESCO is limited in accordance with its programme and by its resources, while UNESCO is granted the right to make proposals on the convention to State Parties on its own initiative.[125] Referring to article 23 of the 1954 Hague Convention, Toman states

---

[121] As quoted in Toman *op.cit* p.259

[122] See, for example, the measures proposed by UNESCO in relation to the 1974 dispute between Israel and Jordan regarding Israel's archaeological excavation in the occupied territories of Jerusalem. See Nafziger, J.A.R., "UNESCO-Centred Management of International Conflict Over Cultural Property" 27 *The Hastings Law Journal* (1976) p.1062

[123] Toman *op.cit* p.260

[124] Article 17 1970 UNESCO Convention.

[125] The secretariat draft had contained a paragraph that read, "2. The Organisation shall accord such assistance within the limits fixed by its programme and by its resources.". This paragraph was inspired by article 23 of the 1954 Hague Convention, which reads; " 1. The High Contracting Parties may call upon the United Nations Educational, Scientific and Cultural Organisation for technical assistance in organising the protection of their cultural property, or in connection with any other problem arising out of the application of the present Convention or the Regulations for its execution. The Organisation shall accord such assistance within the limits fixed by its programme and by its resources.
2. The Organisation is authorised to make, on its own initiative, proposals on this matter to the High Contracting Parties."

that "this article, though modest, is one of the fundamental provisions on which the entire edifice for the protection of cultural property is built".[126] The reason for this is that in the case of the protection of cultural heritage in the event of armed conflict, there is obviously a need for a neutral party to establish an institutional framework within which the protection regime can operate[127]. This is due to the fact that in one particular territory, two competing national protection regimes might operate. In a similar fashion, UCH in international waters requires a neutral party to establish the framework within which a preservation regime can operate. The assistance offered by UNESCO is, however, limited to 'technical assistance' This refers not only to the fact that UNESCO will not offer financial assistance, but that it will also act in an apolitical way, and will confine any assistance to the technical aspects of the preservation of UCH[128]. While it is proposed that UNESCO inform States of activities directed at UCH in areas beyond coastal State jurisdiction, this information would not have been gathered by UNESCO, but rather simply reported by those undertaking activities directed at UCH, or by the ISBA. Thus, UNESCO would not undertake any direct monitoring role.[129] The monitoring system established for cultural heritage by UNESCO under the World Heritage Convention is directed at a limited range of cultural heritage and there is, as yet, no global mechanism for monitoring cultural heritage.

While the negotiating draft has, in part, been influenced by previous UNESCO conventions on cultural heritage, it is clear that these frameworks are unsuited to a preservation regime applicable to UCH, primarily because the undertaking of activities directed at UCH does not occur within a States territory. Thus, unencumbered by the restrictions of sovereignty and territorial jurisdiction of States, UNESCO is able to exert a great deal more influence in these international maritime zones. There is therefore an opportunity for UNESCO to become a body akin to a planetary administrator of UCH in these areas, and to take a more proactive role in the preservation of UCH.

The establishment in 1999 of the Committee for the Protection of Cultural Property in the Event of Armed Conflict is evident of the more proactive role undertaken by UNESCO in the preservation of cultural heritage. The committee fulfils a number of duties; including the granting or cancellation of enhanced protection for cultural heritage; the administration of the List of Cultural Property under Enhanced Protection and the administration of the Fund, established to provide financial or other assistance in support of measures to be taken to protect cultural heritage[130]. The establishment of this Committee has also meant that for each of the main UNESCO conventions, an international committee has been

---

[126] Toman *op.cit* p.255

[127] In the case of the protection of cultural heritage in the event of armed conflict, it was originally proposed, in 1915, that an organisation called the 'Golden Cross' would be established to provide a neutral institution to govern the protection regime. A similar proposal was made in 1936 in the report of the International Museums Office. In 1945, UNESCO was formed with the mandate of protecting the cultural heritage. It has, since then , been regarded as an institution capable of providing an institutional framework for the protection of cultural heritage. For a more detailed discussion of this development, see *Ibid.* pp. 256-258

[128] For a discussion of the meaning of 'technical assistance' as it appears in the 1954 Hague Convention, see *Ibid.* pp.260-262

[129] Monitoring roles are common in international agreements, and include, for example, the Global Environmental Monitoring System established under the United Nations Environment Programme; the International Register of Potentially Toxic Chemicals (IRPTC), the climate monitoring programme established by the World Meteorological Organisation, the Intergovernmental Oceanographic Commission (IOC) established within UNESCO and the United Nations Food and Agricultural Organisations programme for monitoring natural resources. See Weiss *op.cit* p.128

[130] Articles 23-29 Second Protocol to the 1954 Hague Convention, 1999

established to give effect to the convention.[131] It is proposed that the same should apply to any UNESCO convention on the preservation of UCH.

The implementation of a regime that empowers UNESCO to fulfil a global administrative function would overcome the problems that will arise through the implementation of the system of co-operation, notification and collaboration, which it is anticipated will form the basis of a future convention. UNESCO, as the central administrator, would therefore be responsible for co-ordinating activities directed at UCH in all areas beyond coastal State jurisdiction; facilitate co-operation in cases where activities may impact on the natural resources of the CS or EEZ; issue excavation permits; co-operate with States with regard to the seizure of UCH imported into States that have been recovered in a manner not in conformity with the Rules of the Annex; co-ordinate educational programmes; co-ordinate the exchange of technology and expertise; and co-ordinate the enforcement jurisdiction of States. Through these activities, UNESCO could give effect to the principles of sustainable development and benefit and burden sharing of the preservation of UCH.

In order to achieve such a preservation regime, it would, however, be necessary for States to submit to the jurisdiction of UNESCO in this regard. Such a submission would be based on the recognition that the preservation of UCH is the responsibility of all States, and that each State is required to act as the trustee of UCH for the benefit of all humankind.

The State as trustee

The theory of trusteeship lies at the heart of the concept of the common heritage of mankind.[132] "The stewardship ethic[133] also gives theoretical strength to the sharing of the benefits of natural resources not only for those resources that are beyond national boundaries but also those within nations-states."[134] The application of the concept of the common heritage of mankind may act as a unifying principle that applies to all cultural heritage, wherever it is found, and will impress on States the obligations of trusteeship. The inability of humankind to directly enforce the right as beneficiaries should not be seen to undermine these State obligations. Reference to trusteeship in relation to cultural heritage is pervasive in academic literature on cultural heritage.[135] King states that "[t]here is no way, in this contemporary, interconnected world, that we can recognise the absolute power, or absolute

---

[131] The necessity of international committee's to oversee the international protection of cultural heritage was evident during the 1974 dispute between Israel and Jordan concerning Israel's archaeological excavations in the occupied territory of Jerusalem when the UNESCO Commissioner-General for Cultural Property in Israel proposed the appointment of advisors, selected by an international body such as UNESCO, to supervise archaeological excavation in the territory. See Nafziger (1976) *op.cit* p.1066

[132] The trusteeship theory is evident in the majority of the world's religions in the idea that the earth and its fruits belong to all humankind. For a brief discussion of the manner in which the trusteeship is formulated in a number of religions see Baslar *op.cit* pp.14-20.; See also Galloway *op.cit* p.25 and Postyshev *op.cit* p.37

[133] The term stewardship is regarded as synonymous with trusteeship.

[134] Baslar *op.cit* p.16

[135] See for example, Warren *op.cit* and Shestack, A., "The Museum and Cultural Property: The Transformation of Institutional Ethics" in Messenger *op.cit* p.21 and p.114 respectively; Williams *op.cit* p.53

sovereignty, of a state over its cultural patrimony."[136] While this applies to UCH found within its territory, the principle of trusteeship also applies to UCH beyond the coastal State jurisdiction as it will relate to the activities of its national and vessels flying its flag. As such, the State should require that those within it jurisdiction act in accordance with the duties of a trustee.[137]

An acceptance of the principle of trusteeship, as more than simply an ethical principle, will also facilitate the development of a blueprint for international cultural heritage law applicable to all cultural heritage. It will also avoid, or at least minimise, the existing dichotomy between the realisation of the national and international value of cultural heritage so evident in the debate concerning the restitution and return of cultural heritage.

It is unfortunate that some States have difficulties with any form of limitation of the principle of sovereignty, and would be unwilling to regard themselves as a trustee in any respect. By establishing UNESCO as a planetary administrator of UCH in area beyond coastal State jurisdiction, it may foster the acceptance of a principle of trusteeship, thus sowing the seeds for a universal acceptance of this principle. The UNESCO convention must therefore facilitate this development by making the concept of trusteeship more explicit in the convention, even if this may be restricted to the preamble.

Jurisdiction

As is discussed in chapter 5 and *supra*, the negotiating draft convention attempts to preserve UCH through the use of the principles of territorial jurisdiction and sovereignty. UCH would therefore be preserved through the granting of legislative and enforcement competence over greater areas of the oceans to coastal States. This extension was granted to coastal States as they were perceived as being in the best possible position to provide greater administrative and enforcement capabilities over these maritime zones due to their locality. Thus surveillance and policing would be made easier. This, however, presupposes that the coastal State has the infrastructure to undertake these duties. Whilst some States which are in favour of such jurisdictional extensions have such capabilities, such as Australia and Canada, many do not. If those States that have no such capabilities chose to exercise their rights to extend their jurisdictional competence under article 5, option 1 of the negotiating draft, it would reduce the ocean spaces susceptible to regulation and enforcement and therefore would entail a greater area of the ocean space being without adequate protective cover. This State-centred view was clearly evident during negotiations, in which States' concerns revolved around the threat of 'creeping jurisdiction' that the extension of coastal State jurisdiction would entail. These objections not only reflect State views of the law of the sea as territorial in nature, but also the extent to which States rely on the concept of sovereignty as the basis upon which to established a preservation regime. If these views

---

[136] King, J.L., "Cultural Property and National Sovereignty" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press p.199

[137] The principle of trusteeship is evident, for example, in the Declaration of Santo Domingo, which states that "Underwater Cultural Resources is the property of the State in which it is found and through this it is heritage of humanity." This declaration was endorsed by the X Forum of ministers and Officials Responsible for Cultural policies of Latin America and the Caribbean, which took place in Barbados, December 4-5, 1998.

prevail, the law of the sea will hamper the development of an adequate preservation regime.

A new approach is therefore required. In order to adopt an adequate preservation regime for UCH, it is necessary for the world community to regard the threat to UCH as a matter of global concern that requires an interdependent response. From this realisation, the limitations of strictly adhering to the concepts of sovereignty and territorial jurisdiction will become evident, and foster the development of a framework for a preservation regime based on principle which reflect this new awareness. A response to such a global concern requires all States to participate in a preservation regime, and not for such a regime to be based upon the division of competence between States.

"International law determines the limits of the jurisdiction of a state to make and enforce rules regarding marine archaeology, and the duties of states to each other regarding the manner in which they exercise their jurisdiction."[138] The application of the principle of planetary administration will alter this view in that the administration of the law applicable to UCH will no longer be made by each individual State, but by the international community in the forum of UNESCO. Naturally each State Party to the convention will, depending on its constitution, ensure that the applicable law becomes effective within its territory and to its nationals and flag vessels. Although the concept of sovereignty is under attack as being inappropriate as a basis upon which to respond to global threats, it is still the basis upon which participation in the law-making community is determined. Thus, while UNESCO could undertake the administrative function of preserving UCH, States would participate in this process as the subjects of international law. However, while UNESCO would be responsible for the administration, it would not necessarily have any enforcement capabilities and will have to rely on State Parties to enforce the preservation regime. There is therefore a need to consider the jurisdictional competence of States in this regard, particularly in terms of enforcement jurisdiction.

The preservation structure in areas beyond coastal State jurisdiction is based on two principles. Firstly, the principle of nationality provides the basis for jurisdiction so that the State whose nationals or flag vessels engage in activities directed at UCH will have administrative and enforcement competence.[139] Secondly, the territoriality principle is applied in that a State shall prohibit the use of its territory for activities directed at UCH not in conformity with the provisions of the Rules in the Annex.[140] This jurisdictional structure is, however, limited for a number reasons. Firstly, flags of convenience make it easy for persons engaged in activities directed at UCH to evade compliance with the provision of the convention. While the nationality of those on board may still be a basis for jurisdiction, a number of States, including Australia, have considered such a basis for jurisdiction as being too onerous a duty for States to accept. Should such a view predominate, the use of flags of convenience will become the most important threat to UCH in international waters. It is therefore proposed that the nationality of those engaged in activities directed at UCH should form an important basis for a preservation regime.

---

[138] Oxman, B.H., "Marine Archaeology and the International Law of the Sea" 12(3) *Columbia VLA Journal of Law and the Arts* (1988) p. 353

[139] Article 7 secretariat draft. CLT-96/CONF.202/5 Paris, April 1998

[140] Article 6 *Ibid*

The second problem with this jurisdictional structure follows on from the previous point in that the State of nationality may not have any practical policing capabilities in areas outside its territorial seas or CZ. A State Party may therefore have to wait until its nationals or flag vessels enter its territory before it can take any enforcement actions. This problem is compounded by the fact that in international waters, only the State of the flag vessel can take any enforcement actions. Thus, a State whose nationals obtain a charter from another non-State party flag vessel, cannot take any enforcement action until such time as the national enters its territory. As such, enforcement jurisdiction is limited in that a State can only find such jurisdiction in the offending activities directed at UCH either takes place within its territory or by one of its nationals or flag vessels. It cannot, therefore take any action against a non-national who has committed offences outside of its territory. For this reason, the only mandatory sanctions required by the UNESCO draft convention relate to the importation of UCH recovered in a manner not conforming to the Rules in the Annex.[141]

There is therefore a need for a preservation regime that can take into account these difficulties. Global threats may require the imposition of the principle of universal jurisdiction. Thus, a State could "exercise its jurisdiction to apply its laws, even if the act has occurred outside its territory, even if it has been perpetrated by a non-national, and even if nationals have not been harmed by the acts."[142] The exercise of this jurisdiction is, however, controversial, and limited to a narrow range of acts, including piracy[143], slavery and war crimes[144]. A number of treaties create quasi-universal jurisdictional structures in that they require State Parties to the convention to adopt a number of bases for jurisdictional competence as well as the principle of *aut dedire aut punire.*[145] While not a truly universal basis for jurisdiction, limited as it is to State Parties to the convention, it does provide a mechanism for greater enforcement powers. While it is acknowledged that State practise has limited such wide jurisdictional competence in treaties to subjects such as terrorism and high- jacking,[146] it is submitted that the growing need to address problems of global significance will necessitate a wider application of quasi-universal jurisdiction. This may include the threat to the UCH.

It is therefore possible for the UNESCO draft convention to impose a quasi-universal jurisdictional basis. Such an extended jurisdiction is evident, for example in regard to pollution offences. Article 218(1) of UNCLOS introduced extra-territorial jurisdiction for offences relating to pollution[147]. It reads;

---

[141] Article 10 *Ibid*

[142] Higgins *op.cit* p.57.

[143] See *In re Piracy Iure Gentium* [1934] A.C. 586, 589

[144] Akehurst, M., "Jurisdiction in International Law" 46 *British Yearbook of International Law* (1974) p.160

[145] For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, *78* U.N.T.S. 277; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Misc.12 (1985), Cmnd. *9593; (1984) 23 I.L.M. 1027; 1979* International Convention Against the Taking of Hostages, U.K.T.S. *81 (1983),* Cmnd. *9100, 1963 Tokyo Convention on Offences* and Certain Other Acts Committed on Board Aircraft, *704 U.N.T.S 219; 1970 Hague Convention on the* Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105; 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, U.K.T.S. 10 (1974), Cmnd. 5524; T.I.A.S. No. 7570. See Shaw *op.cit* pp.473-478

[146] For an example of the application of the universal basis of jurisdiction, see the case of Yunis in Lowenfeld, A.F., "US Law Enforcement Abroad: The Constitution and International Law" 83 *American Journal of International Law* (1989) pp.880- 893

[147] See Caflish, L., "Submarine Antiquities and the International Law of the Sea" 13 *Netherlands Lawbook of International Law* (1982) pp.3-32

"When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference."

A coastal State is therefore empowered to institute proceedings against a vessel for acts perpetrated outside its territorial jurisdiction. By analogy, it would therefore be possible to establish rules that would grant coastal States enforcement jurisdiction over recovery activities in areas beyond its territorial jurisdiction[148]. The use of such enforcement jurisdictional will allow State Parties to the UNESCO convention to take action against any persons or vessels that have undertaken recovery operation beyond its territorial waters, and then enters its territory *without* the recovered objects of UCH.

The preservation regime could be taken to its ultimate limit, by allowing any State to take enforcement action against any vessel in international waters that is engaged in activities in a manner inconsistent with the Convention, even if the vessel is not a flag vessel of that State, has no nationals of that State on board and has not entered the territory of that State. Such an enforcement regime would coincide with the recognition of UCH as a common concern of mankind. This universal jurisdiction, which would obviously provide the best form of preservation for UCH, is, however, unlikely to be accepted by States at the present stage of evolutionary development.

It may therefore be that at the present stage of development of international law, a more restricted approach could be taken. Such a restricted approach would have to resort to principles of positive international law, though, at the same time, accepting UNESCO as the global administrator of the preservation regime for UCH. The administration of this international co-operative approach to enforcement would require co-ordination through UNESCO, as the body mandated to administer this common concern of humankind. Though the coastal State may not have any jurisdictional competence over activities directed at UCH in their CS or EEZ, it is submitted that the State should be informed of any activities in these zones. Such notification would come from UNESCO, which would receive the information direct from the national/flag State of those undertaking activities directed at UCH. This, together with the surveillance capabilities of some coastal States will allow monitoring of some activities. The reporting of activities in other ocean spaces could be channelled through UNESCO to the State of the nationals or flag vessel involved, who should either be able to undertake enforcement actions themselves, or, again through UNESCO, grant any other State the right to undertake enforcement procedures. The convention could therefore impose a duty for a State to grant such permission, which should not be unreasonably refused. Any State party to the convention could take enforcement action against a vessel in international waters, provided the flag State has given consent. Thus, a type of quasi-universal jurisdictional regime will be constructed, limited in that such jurisdiction would only apply to States party to the UNESCO draft convention and could only be exercised upon the prior consent of the State of nationality/flag registration of the offending parties or vessel. Such a system would fall within the duties of States arising from the principle of co-operation enshrined in the convention.

[148] This may be argued to amount to a form of 'creeping jurisdiction'. It does, however, indicate that when the matter that the international agreement is trying to prevent is of great international importance, the internal community may sanction this extension of coastal State jurisdiction.

The problems of interpretation of UNCLOS and the extent to which the UNESCO draft convention alters the provisions of the former are grounded to a certain extent in the perception of the law of the sea as a territorial regime. Thus, it is unlikely that any extension of coastal State jurisdiction beyond the CZ will be sanctioned. Such a refusal does, however, pose opportunities in relation to recognising the seas as a functional regime in which no State has exclusive jurisdiction. Thus, with a reorientation of the conceptual structure of the law of the sea it may be possible to impose an interdependent response to the preservation of UCH by requiring States to accept a quasi-universal basis for jurisdiction over greater areas of the oceans. The co-ordination of such a response could be administered by the body mandated to represent the common concern of humankind, namely UNESCO.

Conclusion

Although UNESCO has taken a central role, in accordance with its international mandate, to preserve cultural heritage, it has done so in a piecemeal fashion. The draft UNESCO Convention is yet another convention that aims to tackle a specific problem that has arisen in recent times. It does not provide a framework for the preservation of cultural heritage in general, and is nothing more than a 'gap filling' measure. In order to do more than protect the narrow interest defined in the convention, it must contribute to the emerging international framework for the preservation of cultural heritage, and therefore be consistent with those common features to emerge from the conventions and recommendations considered so far. The overriding feature to emerge is the recognition of the cultural heritage as, in some form, constituting the common heritage of humankind.

The principles that underpin the concept of the common heritage of mankind provide a basis for both spatial and temporal solidarity needed in international law to provide effective preservation for UCH. The practical response to the threats to UCH must be participatory if spatial solidarity is to be achieved, and anticipatory if temporal solidarity is to be achieved.[149] The former therefore requires an interdependent response from States, as well as consideration of all the interest groups in the cultural heritage, while the latter requires consideration for future generations.

It must be conceded that the majority of commentators on international law have regarded the concept of the common heritage of mankind as "too vague, confusing, unclear and ill-defined to be useful."[150] While it is conceded that the concept of the common heritage of mankind does not have normative status in international law, the principles that constitute the concept may be made applicable to certain subject matter through conventional international law. It is therefore the thesis of this work that these principles could be utilised to create a framework for the preservation of UCH. The recognition and utilisation of the constituent elements of the concept of the common heritage of mankind in such a way may contribute to the development of the concept in other spheres, and, in the long term, to the recognition of the concept as a peremptory norm of international law. The inclusion of these principles in the UNESCO daft convention will therefore make a valuable contribution in this regard.

---

[149] Weiss, *op.cit* p. xxix
[150] Baslar *op.cit* p.79

Chapter 7

Conclusion

As Litvak King illustrates, the debate concerning the preservation of cultural heritage is "not about objects at all, or artifacts, but about data.". Central to preservation is the concept of provenance of "time and place and their consequences - the stuff data is made of, - not of property, rights, ownership and law."[1] The archaeological value that can be derived from the scientific investigation of UCH is thus the core value that the UNESCO draft convention should embody. While questions of ownership, abandonment and the commercialisation of UCH have consequences for the preservation of UCH, it is possible to structure a preservation regime that avoids these debilitating issues and provides a framework for the introduction of mandatory scientific standards to any activity directed at UCH.

The UNESCO draft convention has its origins in the draft produced by the ILA. The manner in which the draft has developed since then, and the problems encountered during this process have resulted in it undergoing significant changes that ultimately weaken the normative content of the provisions of the preservation regime. This, however, is clearly a consequence of the necessity for ensuring that a broadly accepted convention can be formulated. The success of the preservation regime is dependent upon State co-operation and broad State acceptance; and requires that leading maritime States, particularly those with large active treasure salvage communities, become parties to the anticipated convention. Thus, compromises must be made. While it appears that a draft may emerge from the process, this is in no way guaranteed. In order to facilitate the adoption of a draft, many of the problems associated with the negotiating process require resolution. Most important of which is the reorientation of negotiations aimed at achieving the introduction of the standards of archaeological practise to activities directed at UCH without considering contentious issues which clearly cannot be resolved at this point in time, and certainly not in this forum.

While the provisions of the anticipated draft convention do not provide for a preservation regime as effective as many would have hoped, the success of the process that begun in the ILA Cultural heritage Committee is clearly evident. The issue of the preservation of UCH has once again been raised in international discourse and continued the process begun in the Seabed Committee in the later 1960's. It is a step in an evolutionary process that builds on those aspects of the UNCLOS regime that were agreed on and improves the regime by introducing further preservation provision that, while not acceptable to many States thirty years ago, have matured through the years to the extent that they are now generally acceptable to States. Some provisions, however, remain problematic, particularly coastal State extensions and the commercialisation of UCH. The process of structuring a preservation regime for UCH will continue in the future, so that while these provisions are problematic today, they may be resolved in the future. The UNESCO draft convention should therefore anticipate such a development and attempt to introduce principles upon which further development can take place. To this extent, it is proposed that the principles that constitute the common heritage of mankind provide a basis for an effective future preservation regime for UCH, as well as

[1] King, J.L., "Cultural Property and National Sovereignty" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.199-208

providing a set of principles upon which a blueprint for the preservation of all cultural heritage can be formulated.

This process of structuring and continually improving the provisions of a preservation regime for UCH is heavily dependant upon the implementation of the most effective preservation provision available – education. Only when all States and all people value the importance of the archaeological information that can be derived from the scientific investigation of UCH, and how that information unites all humankind, can a fully effective preservation regime be formulated.

Appendices

Appendix I

Definition of Cultural Heritage and Cultural Property

1954 UNESCO Convention on the Protection of Cultural Heritage in the Event of Armed Conflict [1]

Article 1. Definition of cultural property

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
b. buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);
c. centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments".

1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import. Export and Transfer of Ownership of Cultural Property[2]

For the purposes of the Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each state of being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories;
(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interests;
(g) property of artistic interest, such as;
(i) pictures, paintings and drawings produced by hand on any support and in any material (excluding industrial design and manufactured articles decorated by hand
(ii) original works of statuary art and sculptures in any material;
(iii) original engravings, prints and lithographs;
(iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives including sound, photographic and cinematographic archives;
(k) articles of furniture more than 100 years old and old museum instruments.

---

[1]May 14, 1954, 294 U.N.T.S. 215. Hereafter, "1954 Hague Convention" As at the 14 January 1999, there were 95 State Parties to the Convention and 79 State parties to the protocl.
[2]10 I.L.M (1971). Hereafter "1970 UNESCO Convention". As at 8 January 1997 there are 88 State parties to the Convention. The United Kingdom is not a party to the Convention.

1972 Convention concerning the Protection of the Worlds Cultural and Natural Heritage[3]

Monuments: architectural works, works of monumental sculpture and paintings, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
groups of buildings; groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historic, aesthetic, ethnological or anthropological point of view.[4]

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[5]

The Annex to the Convention, referred to in the definition includes;

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
- (i) pictures, paintings and drawings produced entirely by hand on any support and
- (ii) in any material (excluding industrial designs and manufactured articles decorated by hand);
- (iii) original works of statuary art and sculpture in any material;
- (iv) original engravings, prints and lithographs;
- (v) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations[6]

For the purpose of the present Recommendations, by archaeological excavations is meant any research aimed at the discovery of objects of archaeological character, whether such research involves digging of

---

[3]Nov 16, 1972, 27 U.S.T 37, 11 I.L.M 1358 (1972)
[4]The 1972 UNESCO Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage contains a definition of 'cultural heritage' almost identical to that of the 1972 World Heritage Convention. The recommendations define the cultural heritage as follows; "For the purposes of this Recommendation, the following shall be considered as 'cultural heritage': monuments: architectural works, works of monumental sculpture and painting, including cave dwellings and inscriptions, and elements, groups of elements or structures of special value from the point of view of archaeology, history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of special value from the point of view of history, art or science; sites: topographical areas, the combined works of man and of nature, which are of special value by reason of their beauty or their interest from the archaeological, historical, ethnological or anthropological points of view."
[5] Signed on 24 June 1995. Hereafter "UNIDROIT Convention"
[6] Adopted by the UNESCO General Conference as its 9th Session, New Delhi, 5 December 1956;

the ground or systematic exploration or is carried out on the bed or in the subsoil of inland or territorial waters of a member state.

The provisions of the present Recommendation apply to any remains, whose preservation is in the public interest from the point of view of history or art and architecture, each member state being free to adopt the most appropriate criterion for assessing the public interest of objects found in its territory. In particular, the provisions of the present recommendation should apply to any monuments and movable or immovable objects of archaeological interest considered in the widest sense.

1968 UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public and Private Works

For the purpose of this recommendation, the term 'cultural property' applies to:
(a) Immovables, such as archaeological and historic or scientific sites, structures or other features of historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still extant in valid form. It applies to such immovables constituting ruins existing above the earth as well as to archaeological or historic remains found within the earth. The term cultural property also includes the setting of such property;
(b) Movable property of cultural importance including that existing in or recovered from immovable property and that concealed in the earth, which may be found in archaeological or historical sites or elsewhere.

2. The term 'cultural property' includes not only the established and scheduled architectural, archaeological and historic sites and structure, but also the unscheduled or unclassified vestiges of the past as well as artistically or historically important recent sites and structures.

1972 UNESCO Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage

1. For the purposes of this Recommendation, the following shall be considered as
'cultural heritage':
monuments: architectural works, works of monumental sculpture and painting, including cave dwellings and inscriptions, and elements, groups of elements or structures of special value from the point of view of archaeology, history, art or science;
groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of special value from the point of view of history, art or science;
sites: topographical areas, the combined works of man and of nature, which are of special value by reason of their beauty or their interest from the archaeological, historical, ethnological or anthropological points of view.

1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property

Cultural Property shall be taken to mean items which are the expression and testimony of human creation and the evolution of nature, in the opinion of the competent bodies in individual states, are, or my be, of historic, artistic, scientific or technical value and interest, including items in the following categories:
(a) zoological, botanical and geological specimens;
(b) archaeological objects;
(c) objects and documents of ethnological interest;
(d) works of fine art and of applied arts;
(e) literary, musical, photographic and cinematographic works;
(f) archives an documents.

1978 UNESCO Recommendation for the Protection of Movable Cultural Heritage

1. For the purposes of this Recommendation:
(a) 'movable cultural property' shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest, including items in the following categories:

(i)products of archaeological exploration and excavations conducted on land and under water;
(ii) antiquities such as tools, pottery, inscriptions, coins, seals, jewellery, weapons and funerary remains, including mummies;
(iii) items resulting from the dismemberment of historical monuments;
(iv) material of anthropological and ethnological interest;
(v) items relating to history, including the history of science and technology and military and social history, to the life of peoples and national leaders; thinkers, scientists and artists and to events of national importance;
(vi) items of artistic interest, such as: paintings and drawings, produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); original prints, and posters and photographs, as the media for original creativity; original artistic assemblages and montages in any material; works of statuary art and sculpture in any material; works of applied art in such materials as glass, ceramics, metal, wood, etc.;
(vii) manuscripts and incunabula, codices, books, documents or publications of special interest;
(viii) items of numismatic (medals and coins) and philatelic interest;
(ix) archives, including textual records, maps and other cartographic materials, photographs, cinematographic films, sound recordings and machine-readable records;
(x) items of furniture, tapestries, carpets, dress and musical instruments;
(xi) zoological, botanical and geological specimens;

1985 European Convention on Offences Relating to Cultural Property[7]

1.a products of archaeological exploration and excavations (including regular and clandestine) conducted on land and underwater;
b. elements of artistic or historical monuments or archaeological sites which have been dismembered;
c. pictures, paintings and drawings produced entirely by hand on any support and in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
d. original works of statutory art and sculpture in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view and items resulting from the dismemberment of such works;
e. original engravings, prints, lithographs and photographs which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
f. tools, pottery, inscriptions, coins, jewellery, weapons and funeral remains, including mummies, more than one hundred years old;
g. articles of furniture, tapestries, carpets, and dress more than one hundred years old;
h. musical instruments more than one hundred years old;
i. rare manuscripts and incunabula, singly or in collection.

2.a original artistic assemblages or montages in any material which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
b. works of applied art in such material as glass, ceramics, metal, wood etc. which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
c. old books documents and publications of special interest (historical, artistic, scientific, literary etc. singly or in collections;
d. archives, including textual records, maps and other cartographic material, photographs, cinamatograhic film, sound recordings and machine-readable records which are of great importance from an artistic, historical, archaeological, scientific or otherwise cultural point of view;
e. property relating to history, including the history of science and technology and military and social history;
f. property relating to the life of national leaders, thinkers, scientists and artists;

---

[7]E.T.S No.119

g. property relating to events of national importance;
h. rare collections and specimens of fauna;
i. rare collections and specimens of flora
j. rare collections and specimens of minerals;
k. rare collections and specimens of anatomy;
l. property of paleontological interest;
m. material of anthropological interest;
n. property of ethnological interest;
o. property of philatelic interest
p. rare property of numismatic interest (medals and coins);
q. all remains and objects, or any other traces of human existence, which bear witness to epochs and civilisations for which excavations are the main source or one of the main sources of scientific information;
r. monuments of architecture, art or history;
s. archaeological and historic or scientific sties of importance, structures or other features of important historic, artistic or architectural interest, whether religious or secular, including groups of traditional structures, historic quarters or rural built-up area and the ethnological structures of previous cultures still existent in valid form.

1985 Council of Europe Draft Convention on the Protection of the Underwater Cultural Heritage[8]

1.For the purposes of this convention all remains and objects and any other traces of human existence located entirely or in any part in the sea, lakes, rivers, canals, artificial reservoirs and other bodies of water, or in tidal or other periodically flooded areas, or recovered as from any such environment, or washed ashore, shall be considered as being part of the underwater cultural heritage and are hereinafter referred to as "underwater cultural property".

2. Underwater cultural property which is one hundred years old shall enjoy protection under this Convention.

1992 European Convention on the Protection of the Archaeological Heritage(Revised)[9]

1. The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument of historic and scientific study.
2.To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:
   i.the preservation and study of which help to retrace the history of mankind and its relation with the natural environment:
   ii.for which excavations or discoveries and other methods of research into mankind and the related environment are the main source of information; and
   iii.which are located in any area within the jurisdiction of the parties.
3. The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, movable objects, monuments of other kinds as well as their context, whether situated on land or underwater.

---

[8]June, 24 1984 Dir/Jur(84), Strasbourg
[9] E.T.S No. 143 signed at Valetta, 16 January 1992

Appendix II

INTERNATIONAL LAW ASSOCIATION

BUENOS AIRES DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

The Committee has prepared a Convention that provides basic protection beyond the territorial seas of coastal states for a very sensitive and precious heritage that is subject to growing threats of damage and destruction. A second purpose has been to help avoid and resolve jurisdictional issues involving underwater cultural heritage.

We were motivated by a conviction that both supporters and critics of a progressive development of the law share in a responsibility to devise the best means of avoiding further spoliation of the common heritage at sea. To do nothing is to fail, individually and collectively, to shoulder this responsibility.

To help ensure acceptability of the Convention, the Committee solicited views and suggestions from a broad range of persons and institutions. Present and past expressions of opinion by particular States were taken into account primarily as a means of elaborating and amplifying particular points. Particular attention was paid to the 1982 United Nations Convention on the Law of the Sea and the 1992 European Convention on the Protection of the Archaeological Heritage (Revised).

Preamble

States party to the present Convention,

Acknowledging the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage;

Noting growing public interest in the underwater cultural heritage;

Perceiving that growing threats to the underwater cultural heritage include increasing construction activity, advanced technology that enhances identification of and access-to wreck, exploitation of marine resources, and commercialization of efforts to recover underwater cultural heritage;

Determining that the underwater cultural heritage may be threatened by irresponsible activity and that therefore co-operation among States, salvors, divers, their organizations, marine archaeologists, museums and other scientific institutions is essential for the protection of the underwater cultural heritage;

Considering that exploration, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicates a need for uniform governing criteria;

Recognizing that the underwater cultural heritage belongs to the common heritage of humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of
international law;

Bearing in mind the need for more stringent supervision to prevent any clandestine excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance;

Realizing the need to codify and progressively develop the law in conformity with international rules and practice, including provisions in the 1982 United Nations Convention on the Law of the Sea;

Convinced that information and multidisciplinary education about the underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activity affecting the underwater cultural heritage, will enable the public to appreciate the importance of the underwater cultural heritage to humanity and the need to preserve it; and

Committed to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of the heritage that may be found beyond the territorial sea;

Have agreed as follows:

Article 1: Definitions

For the purposes of this Convention:

1. 'Underwater cultural heritage' means all underwater traces of human existence including:

(a) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural contexts; and
(b) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.

2. Underwater cultural heritage shall be deemed to have been abandoned":

(a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of the heritage within 25 years after discovery of the technology; or

(b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in the underwater cultural heritage.

3. 'Cultural heritage zone' means all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law.

4. 'Charter' means the 'Charter for the Protection and Management of the Underwater Cultural Heritage' prepared by the International Council for Monuments and Sites (ICOMOS) and annexed to this Convention.

Article 2: Scope of the Convention

1. This Convention applies to underwater cultural heritage which has been lost or abandoned and is submerged underwater for at least 100 years. Any State Party may, however, protect underwater cultural heritage which has been submerged underwater for less than 100 years.

2. This Convention does not apply to any warship, military aircraft, naval auxiliary, or other vessels or aircraft owned or operated by a State and used for the time being only on government non-commercial service, or their contents.

Article 3: General Principle

States Party shall take all reasonable measures to preserve underwater cultural heritage for the benefit of humankind.

Article 4: Non-Applicability of Salvage Law

Underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage.

Article 5: Cultural Heritage Zone

1. A State Party to this Convention may establish a cultural heritage zone and notify other States Party of its action. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage.

2. A State Party shall take measures to ensure that activities within its zone affecting the underwater cultural heritage comply at a minimum with the provisions of the Charter.

Article 6: Internal and Territorial Waters

States Party shall transmit a copy of the Charter to all relevant authorities within their jurisdiction, requiring them to take appropriate measures to apply the Charter, at a minimum, to activity within their internal and territorial waters.

Article 7: Prohibition of the Use of Territory in Support of Activities Violating the Charter

No State Party shall allow its territory or any other areas over which it exercises jurisdiction to be used in support of any activity affecting underwater cultural heritage and inconsistent with the criteria of the Charter. This provision shall apply to any such activity beyond that State's territorial sea but not within a-territorial sea or cultural
heritage zone of another State Party.

Article 8: Prohibition of Certain Activities by Nationals and Ships

Each State Party shall undertake to prohibit its nationals and ships of its flag from activities affecting underwater cultural heritage in respect of any area which is not within a cultural heritage zone or territorial sea of another State Party. The prohibition shall not apply to activities affecting the underwater cultural heritage that comply with the Charter.

Article 9: Permits

A State Party to this Convention may provide for the issuance of permits allowing entry into its territory of underwater cultural heritage excavated or retrieved after the effective date of this Convention so long as the State has determined that the excavation and retrieval activities have complied or will comply with the Charter.

Article 10: Seizure of Heritage

1. Subject to Article 9, on the request of any Party or on its own initiative, each State Party, in accordance with its constitutional procedures, shall seize any underwater cultural heritage brought within its territory, directly or indirectly, after having been excavated or retrieved in a manner not conforming with the Charter.

2. A State shall seize underwater cultural heritage known to have been excavated or retrieved from a cultural heritage zone or territorial sea of another State Party only after obtaining the consent of that State.

Article 11: Penal Sanctions

1. Each State Party undertakes to impose penal sanctions for importation of underwater cultural heritage which is subject to seizure under Article 10.

2. Each State Party agrees to cooperate with other Parties in the enforcement of these sanctions. Such co-operation, consistent with national procedures, shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.

Article 12: Notification Requirements and Treatment of Seized Heritage

1. Each State Party undertakes to notify the State or States of origin, if known, of its seizure of underwater cultural heritage under this Convention.

2. Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.

3. Each Party undertakes, wherever possible, to keep underwater cultural heritage seized under this Convention on display or otherwise ensure the fullest reasonable access to it for the benefit of the public.

Article 13: Collaboration and Information-Sharing

1. Whenever a State has expressed a patrimonial interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Party concerning underwater cultural heritage, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to the Charter or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.

3. Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to the Charter or otherwise in violation of international law.

Article 14: Education

Each State Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Charter.

Article 15: Revision of the Charter

Revisions in the Charter by the International Council for Monuments and Sites shall be deemed to be revisions in the annexed Charter, binding on States Party except for those State Parties that notify their non-acceptance to the Director-General of the United Nations Educational, Scientific and Cultural Organization within six months after the effective date of a revision. Unesco shall inform the States Party of such revisions prior to the effective date of the revision.

Article 16: Dispute Resolution

1. States, on becoming Parties to this Convention, undertake to establish an internal procedure or procedures for resolving disputes concerning whether an activity resulting in excavation or retrieval of the underwater cultural heritage did or did not comply with the Charter.

2. Any dispute between two or more States Party concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the States Party are unable to agree on the organization of the arbitration, any one of those States Party may refer the dispute to the International Court of Justice, or a special chamber thereof, by a request in conformity with the Statute of the Court.

Article 17: Official Languages

This Convention is drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Article 18: Ratification or Acceptance

1. This Convention shall be subject to ratification or acceptance by States Members of the United Nations Educational, Scientific and Cultural Organization, in accordance with their respective constitutional procedures.

2. The instruments of ratification or acceptance shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 19: Applicability to Territorial Units

1. If a State Party has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may substitute its declaration by another declaration at any time.

2. These declarations are to be notified to the depository and are to state expressly the territorial units to which the Convention extends.

Article 20: Reservations, Understandings and Declarations

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall receive and circulate to all States Party the text of reservations, understandings and declarations made by States at the time of ratification or accession.

2. A reservation incompatible with the objects and purposes of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 21: Accession by Non-member States

1. This Convention shall be open to accession by all States not Members of the United Nations Educational Scientific and Cultural Organization.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

Article 22: Entry into Force

This Convention shall enter into force three months after the date of the deposit of the tenth instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments of ratification, acceptance or accession on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession.

Article 23: Denunciations

1. Each State Party to this Convention may denounce the Convention.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

3. The denunciation shall take effect six months after notification.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization during its ... session, which was held in ... and declared closed on the ... day of ....

IN FAITH WHEREOF we have appended our signatures this ... day of

The President of the General Conference

The Director-General

Appendix III

UNESCO DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

Referred to as 'the secretariat draft' throughout the thesis
(CLT-96/CONF.202/5 Paris, April 1998)

Preamble

States party to the present Convention,

Acknowledging the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage;

Noting growing public interest in the underwater cultural heritage;

Aware of the fact underwater cultural heritage is threatened by unsupervised activities not respecting fundamental principles of underwater archaeology and the need for conservation and research of underwater cultural heritage;

Aware further of increasing commercialisation of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks

Conscious also of growing threats to underwater cultural heritage from various other activities namely exploration of natural resources of various maritime zones, constructions, including construction of artificial islands, installations and structures, laying of cables and pipelines;

Believing that co-operation among states, marine archaeologists, museums and other scientific institutions, salvors, divers and their organisations is essential for the protection of underwater cultural heritage;

Considering that exploration, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialisation, all of which indicates a need for uniform governing criteria;

Recognising that the underwater cultural heritage belongs to the common heritage of humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law;

Bearing in mind the need for more stringent supervision to prevent any clandestine excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance;

Realising the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the 1982 United Nations Convention on the Law of the Sea of 10 December 1982;

Convinced that information and multidisciplinary education about the underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activity affecting it will enable the public to appreciate the importance of the underwater cultural heritage to humanity and the need to preserve it; and

Committed to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of the heritage that may be found beyond the territories of states ;

Have agreed as follows:

Article 1: Definitions

For the purposes of this Convention:

1. (a)"Underwater cultural heritage" means all underwater traces of human existence underwater for at least 100 years, including:

(a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and

(b) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.

(b) Notwithstanding the provisions of paragraph 1(a), a State Party may decide that certain traces of human existence constitutes underwater cultural heritage even though they have been underwater for less than 100 years.

2. Underwater cultural heritage shall be deemed to have been abandoned":

(a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of such underwater cultural heritage within 25 years after discovery of the technology; or

(b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in the underwater cultural heritage.

4. 'Charter' means the 'Charter for the Protection and Management of the Underwater Cultural Heritage' adopted by the International Council for Monuments and Sites (ICOMOS) at Sofia 1996, the operative provisions of which are annexed to this Convention.

Article 2: Scope of the Convention

1. This Convention applies to underwater cultural heritage which has been abandoned according to Article 1, paragraph 2.

2. This Convention shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes

Article 3: General Principle

States Party shall preserve underwater cultural heritage for the benefit of humankind.

Article 4: Underwater Cultural Heritage in Internal Waters, Archipelagic Waters and Territorial Sea

1. State Parties, in the exercise of their sovereignty, have exclusive right to regulate and authorise activities affecting underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, State Parties shall take all necessary measures to ensure that, at a minimum, the operative provisions of the Charter be applied to activities affecting the underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

Article 5: Underwater Cultural Heritage in the Exclusive Economic Zone and the Continental Shelf

1. State Parties shall require the notification of any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf.

2. State Parties may regulate and authorise all activities affecting underwater cultural heritage in the exclusive economic zone and on the continental shelf, in accordance with this Convention and other rules of international law.

3. In authorising any such activities, State Parties shall require, at a minimum, with the operative provisions of the Charter, in particular taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education.

4. State Parties may deny authorisation for the conduct of activities affecting underwater cultural heritage having the effect of unjustifiably interfering with the exploration or exploitation of their natural resources, whether living or not living.

5. State Parties shall make punishable all breaches of the terms of permits authorising the conduct of activities affecting underwater cultural heritage.

Article 6: Non-Use of Areas under the Jurisdiction of the Coastal State

1. No State Party shall allow use of its territory, including its marine ports and offshore terminals, or other areas under its jurisdiction such as the continental shelf or exclusive economic zone, in support of any activity affecting underwater cultural heritage and inconsistent with the provisions of the Charter.

2. This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises controls over the exploration, excavation and management of the underwater cultural heritage in accordance with Article 5 (2) of this Convention unless requested by that State.

Article 7: Prohibition of Certain Activities by Nationals and Ships

1. A State Party shall take all such measures as may be necessary to ensure that its national and vessels flying its flag do not engage in any activity affecting underwater cultural heritage in a manner inconsistent with the principles of the Charter.

2. Measures to be taken by a State Party in respect of its nationals and vessels flying its flag shall include, among others, the establishment of regulations;

(a) to prohibit activities affecting underwater cultural heritage in areas where no State Party exercises its jurisdiction under Article 5 otherwise than in accordance with the terms and condition of a permit or authorisation granted in compliance with the provisions of the Charter;

(b) to ensure that they do not engage in activities affecting underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises its jurisdiction under article 5, in a manner contrary to the laws and regulations of that State.

Article 8: Permits

1 A State Party may provide for the issuance of permits, subject to the compliance with the operative provisions of the Charter, allowing entry into its territory of underwater cultural heritage.

2. Should an excavation or retrieved of underwater cultural heritage occur without prior authorisation of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter.

Article 9: Seizure of Underwater Cultural Heritage

1. Subject to Article 8, each State Party shall provide for the seizure of underwater cultural heritage excavated or retrieved in a manner not in conformity with the operative provision of the Charter, which is brought to its territory, either directly or indirectly.

2. A State shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Article 5 paragraph 2 to 5 above only after the request or with the consent of that State.

Article 10: Other Sanctions

1. Each State Party shall impose criminal or administrative sanctions for importation of underwater cultural heritage which is subject to seizure under Article 9.

2. States Parties agree to cooperate with each other in the enforcement of these sanctions. Such co-operation shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.

Article 11: Notification Requirements and Treatment of Seized Heritage

1. Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.

2 Each State Party shall notify its seizure of underwater cultural heritage under this Convention to any other State Party which is known to have an interest therein.

Article 12: Disposition of Underwater Cultural Heritage

1. A State Party which has seized underwater Cultural Heritage shall decide on its ultimate disposition for the public benefit taking into account the needs of conservation and research including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education and the interests of those States which have expressed a national heritage interest in it.

2. State Parties shall provide for the non-application of any internal la or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage.

Article 13: Collaboration and Information-Sharing

1. Whenever a State has expressed a patrimonial interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Party concerning underwater cultural heritage, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to the operative provisions of the Charter or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.

3. Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to the operative provisions of the Charter or otherwise in violation of international law.

Article 14: Underwater Cultural Heritage in the Area

Any discovery of underwater cultural heritage in the Area, as defined in Article 1, paragraph 1(1) of the United Nations Convention on the Law of the Sea, shall be reported by the finder to the Secretary-General of the International Seabed Authority, which shall transmit the information to the Director-General of the United Nations Educational, Scientific and Cultural Organisation.

Article 15: Education

Each State Party shall endeavour by educational means to create and develop in the public mind a realisation of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Charter.

Article 16: Training in underwater archaeology

State Parties shall take measures to further research in accordance with the operative provisions of the Charter by providing training in underwater archaeological investigation and excavation methods and in techniques for the conservation of underwater cultural heritage, or by encouraging the competent bodies or organisations to do so.

Article 17: Assistance of UNESCO

1. State Parties may call upon the UNESCO for technical assistance concerning underwater cultural heritage as regards information and education, consultation and expert advice, co-ordination and good offices or in connection with any problems arising out of the application of the present Convention or the operative provisions of the Charter.

2. The Organisation shall accord such assistance within the limits fixed by its programme and by its resources.

3. The Organisation may, on its own initiative, conduct research and publish studies on matters relevant to the protection of the underwater cultural heritage.

Article 18: National Services

1. In order to ensure effective implementation of this Convention, State Parties undertake to expand the activities of existing national services or, if appropriate. to establish national services for that purpose.

2. National services should actively encourage the participation of interested persons in preservation and study of the underwater cultural heritage and in support of archaeological research. This participation is subject to the harmonisation and control of the national service concerned and must respect the operative provisions of the charter.

3. State Parties shall establish an internal procedure or procedures for resolving disputes concerning whether or not an activity affecting underwater cultural heritage is in conformity with the operative provisions of the charter.

Article 19: Peaceful Settlement of Disputes

2. Any dispute between two or more States Party concerning the interpretation or application of the present Convention or the operative provisions of the Charter and not settled by negotiation shall, at the request of any of the parties to the dispute, be submitted to arbitration. If the State Parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

Article 20: Ratification, Acceptance, Approval or Accession

1. Member States of UNESCO, as well as Non-Member States of UNESCO which have been invited by the Executive Board of UNESCO, may become Parties to this Convention by depositing with the Director-General of UNESCO an instrument of ratification, acceptance, approval or accession.

2. The Convention shall enter into force three months after the deposit of the fifth instrument referred to in paragraph 1, but solely with respect to the five States that have so deposited their instruments. It shall enter into force for each State three months after that State has deposited its instrument.

Article 21: Reservations and Exceptions

No reservations or exceptions may be made to this Convention

Article 22: Amendments

1. A State Party may, by written communicate addressed to the Director General of UNESCO, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the General-Conference of the UNESCO for adoption.

2. Once adopted, amendments to this Convention shall subject to ratification, acceptance, approval or accession by the States Parties, unless otherwise provided in the amendment itself.

3. Articles 21 and 23 shall apply to all amendments to this Convention

4. Amendments to this Convention shall enter into force for the States Parties accepting or acceding to them three months after the deposit of the instrument referred to in paragraph 2 by two thirds of the States Parties. Thereafter, for each other State Party it shall enter into force three months after the deposit of its instrument

5. An amendment may provide that a smaller or larger number of acceptances or accessions shall be required for its entry into force than are required by this article.

(6). A Sate which becomes a Party to this Convention after the entry into force of amendments in accordance with paragraph 4 shall, failing an expression of different intention by the State:

(a) be considered as a Party to this Convention as so amended; and

(b) be considered as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 23: Denunciations

1. Each State Party may, by written notification addressed to the Director-General of UNESCO denounce the Convention.

2. The denunciation shall take effect twelve moths after the date of receipt of notification unless the notification specifies a later date.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention

Article 24: The Charter

1. The operative provision of the Charter annexed to this Convention from an integral part of it, and unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the operative provision of the Charter relating thereto.

2. The Charter may be revised from time to time by the International Council for Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The Director-General of the United Nations Educational, Scientific and Cultural Organisation shall notify all State Parties to this Convention of the text of such revisions. State Parties shall be bound by the revisions, except those State Parties that notify the depository of their non-acceptance in writing. Such notification shall be made within six months after the receipt of the notification of the texts of revisions.

3. A State which becomes a Party to this Convention after the adoption of amendments to the operative provisions of the Charter in accordance with paragraph 2 shall:

(a) be considered to have accepted the operative provisions of the Charter as so amended; and

(b) be considered as having accepted the unamended operative provisions of the charter in relation to any State Party not bound by the amendments to the operative provisions of the charter.

Article 25: Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Appendix IV

DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE*

Referred to as 'the negotiating draft' throughout this thesis

CLT-96/CONF.202/5 Rev.2 PARIS, July 1999

Preamble

The States Parties to the present Convention,

Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage,

Noting growing public interest in underwater cultural heritage,

Aware of the fact that underwater cultural heritage is threatened by unsupervised activities not respecting fundamental principles of underwater archaeology and the need for conservation and research of underwater cultural heritage,

Aware further of increasing commercialization of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks,

Conscious also of growing threats to underwater cultural heritage from various other activities, namely exploitation of natural resources of various maritime zones, construction, including construction of artificial islands, installation and structures, laying of cables and pipelines,

Believing that cooperation among States, marine archaeologists, museums and other scientific institutions, salvors, divers and their organizations is essential for the protection of underwater cultural heritage,

Considering that exploration, excavation, and protection of underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicates a need for uniform governing criteria,

Recognizing that underwater cultural heritage should be preserved for the benefit of humankind, and that therefore responsibility for its protection rests not only with the State or States most directly concerned with a particular activity affecting the heritage or having an historical or cultural link with it, but with all States and other subjects of international law,

Bearing in mind the need for more stringent measures to prevent any clandestine or unsupervised excavation which, by destroying the environment surrounding underwater cultural heritage, would cause irremediable loss of its historical or scientific significance,

Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including the United Nations Convention on the Law of the Sea of 10 December 1982,

Convinced that information and multi-disciplinary education about underwater cultural heritage, its historical significance, serious threats to it, and the need for responsible diving, deep-water exploration and other activities affecting it, will enable the public to appreciate the importance of underwater cultural heritage to humanity and the need to preserve it, and

---

* *Chairman's note: the footnotes in this text, except where otherwise indicated, were inserted by the relevant Working Group and taken account of in the Plenary, or were added during the Plenary discussion of the Working Group's paper.*

Committed to improving the effectiveness of measures at international and national levels for the preservation in place or, if necessary for scientific or protective purposes, the careful removal of underwater cultural heritage that may be found beyond the territories of States

Have agreed as follows:

Article 1

Definitions

For the purposes of this Convention:

1. (a) "Underwater cultural heritage" means all traces of human existence[1] [which have been] partially, totally or periodically [situated] underwater for at least 100 years [or are 100 years old and underwater], including:

(i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts;[2] and

(ii) wreck[3] such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.

(b) Notwithstanding the provision of paragraph 1(a), a State Party may designate certain traces of human existence within its jurisdiction[4] as underwater cultural heritage even though they have been underwater for less than 100 years.

2. "States Parties" means States which have consented to be bound by this Convention and for which the Convention is in force.

3. "UNESCO" means United Nations Educational, Scientific and Cultural Organization.

4. "Director-General" means the Director-General of UNESCO.

[5. "Convention" means the 1982 United Nations Convention on the Law of the Sea.]

[6. "Activity directed at underwater cultural heritage" means activity having underwater cultural heritage as its primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.]

Article 2

Scope of the Convention[5]

1. [DELETE]

1. [This Convention applies to underwater cultural heritage found at sea.]

1. [This Convention shall apply to underwater cultural heritage irrespective of its location and to activities which affect or endanger it.]

---

1 Proposals to add criteria of significance or other limitations on the breadth of this formulation were noted as criteria desired by a number of delegations.

2 It was noted that "sites" and "natural contexts" might need definitions depending on the decision taken on Articles 4 to 7.

3 It was noted that "wreck" (in the English text) is a technical term of salvage law and includes more than shipwrecks. It was therefore agreed not to use the word "wrecks".

4 Certain delegations understand this to mean "in waters under its jurisdiction or in respect of vessels of its flag".

5 This formulation represents the three different views on this Article which it was felt could not be resolved before discussions of Articles 4 to 7.

[2. This Convention shall not apply to the remains and contents of any warship, naval auxiliary, other vessel or aircraft owned or operated by a State and used, at the time of its sinking, only for non-commercial purposes.]

[Article 2 bis

Relationship between this Agreement and the Convention

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. [This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.[6]]]

Article 2 ter

Regional agreements

(would be placed here if Option 1 for Articles 5 and 6 is adopted; text is included within Options 2 and 3)

Article 3

General principle

1. The States Parties shall preserve the underwater cultural heritage for the benefit of humankind in accordance with the provisions of this Convention.

[2. To that end, States Parties shall take all necessary measures to cooperate, specifically in the event of common interest by reason of the localization of the wreck and the flag State or because of the same cultural, archaeological or historical origin.]

Article 4

Underwater cultural heritage
in internal waters, archipelagic waters and territorial sea[7]

1. States Parties, in the exercise of their sovereignty, have the exclusive right [in accordance with Article 2][8] [without prejudice to Article 2] to regulate and authorize [activities directed at] underwater cultural heritage in their internal water, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties [should take all necessary measures to ensure] [shall require] that, at a minimum, the Rules of the Annex be applied to [activities directed at] underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

---

6 It was noted that a final decision on this question could not be made until the result of this working group of Articles 4 to 7.

7 Certain delegations proposed adding a new paragraph to Article 4 to ensure efficient protection of underwater cultural heritage located in occupied territories.

8 There were concerns expressed that the final draft of this clause should not prejudice the rights and duties of States in their internal waters and territorial sea.

Article 4 bis

Underwater cultural heritage in the contiguous zone[9]

States Parties may [in applying Article 303(2) of the United Nations Convention on the Law of the Sea] regulate and authorize [in accordance with Article 303(2) of the United Nations Convention on the Law of the Sea] [activities directed at] underwater cultural heritage within their contiguous zone. In doing so, States Parties [shall] [should] require compliance, at a minimum, with the Rules of the Annex.

[In respect of Articles 5, 6 and 7, three options were offered for consideration but the positions of all States are reserved.]

OPTION 1

Article 5

Underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. States Parties shall require that any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf be reported to their competent authorities.[10]

2. States Parties may regulate [activities directed at] underwater cultural heritage in their exclusive economic zone and on their continental shelf. In doing so, States Parties shall require compliance, at a minimum, with the Rules of the Annex, in particular taking into account the needs of conservation and research.

3. States Parties may deny the conduct of [activities directed at] underwater cultural heritage having the effect of [unjustifiably] [interfering with the exploration or exploitation of their natural resources, whether living or not living, and with other rights or jurisdiction which they enjoy under the United Nations Convention on the Law of the Sea in these areas].

4. States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

Article 6

Non-use of areas under the jurisdiction of the coastal State

States Parties shall take measures to prohibit the use of their territory, including their maritime ports and off-shore terminals, or other area under their jurisdiction or control in support of any [activity directed at] underwater cultural heritage and inconsistent with the Rules of the Annex.

Article 7

Prohibition of certain activities by nationals and ships

1. States Parties shall take all practicable measures to ensure that [their nationals and] vessels flying their flag refrain from engaging in any [activity directed at] underwater cultural heritage in a manner inconsistent with the Rules of the Annex.

---

9 One delegation considered that this provision would not apply to semi-enclosed areas.

10 It was noted that some clarification could be made as to who should report and to which competent authorities. The need was also noted to reflect on how to notify discoveries made in areas subject to conflicting claims.

2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include:

(a) prohibition of [activities directed at] underwater cultural heritage in areas where no State Party exercises control under Article 5(2) otherwise than in accordance with the Rules of the Annex;

(b) all practicable measures to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises control under Article 5(2) in a manner contrary to the laws and regulations of that State.

OPTION 2

Article 5

Underwater cultural heritage in the exclusive economic zone and on the continental shelf

In the exercise of their sovereign rights in the exclusive economic zone and on the continental shelf, as provided for in the United Nations Convention on the Law of the Sea, States Parties shall take account of the need to protect underwater cultural heritage in accordance with this Convention.

Article 6

Non-use of areas under the jurisdiction of the coastal State

1. All States Parties shall take measures to prohibit use of their territory, including their maritime ports and off-shore terminals, or other area under their jurisdiction or control in support of any activity directed at underwater cultural heritage and inconsistent with the Rules of the Annex.

2. This provision shall apply to any such activity beyond that State's territorial sea but not within an area over which another State exercises control [in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea] unless requested by that State.

Article 7

Prohibition of certain activities by nationals and ships

1. States Parties shall require that any discovery relating to underwater cultural heritage by their nationals or through the activities of vessels flying their flag in the exclusive economic zone or the continental shelf of another State be reported to the competent authorities of that State or the State of origin, or the State of cultural origin, or the State of historical and archaeological origin.[11]

2. Measures to be taken by a State Party in respect of [its nationals and] vessels flying its flag shall include:

(a) to prohibit [activities directed at] underwater cultural heritage in areas where no State Party exercises sovereignty or control in a manner contrary to the Rules of the Annex;

(b) to ensure that they do not engage in [activities directed at] underwater cultural heritage within the exclusive economic zone or continental shelf of a State Party which exercises sovereignty or control in a manner contrary to the Rules of the Annex.

[11] The need was also noted to reflect on how to notify discoveries made in areas which are subjected to conflicting claims.

New article

(to be consistent, this is provisionally called:)

Article 2 ter

Regional agreements[12]

States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

OPTION 3

[Article 2 bis

Relationship between this Convention and UNCLOS

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under the United Nations Convention on the Law of the Sea. [This Convention shall be interpreted and applied in the context of and in a manner consistent with UNCLOS.]]

Article 2 ter

Regional agreements

States may enter into regional or bilateral agreements, or develop existing agreements, for the preservation of common underwater cultural heritage. For this purpose, they may adopt rules and regulations which may be more stringent than those adopted at global level. [These agreements will be open to States of cultural origin and States of historical and archaeological origin.]

Article 5

Underwater cultural heritage in the exclusive economic zone and on the continental shelf**

1. A State Party shall be notified of any activity or discovery relating to underwater cultural heritage occurring in its exclusive economic zone or on its continental shelf.[13]

2. Such State Party shall take appropriate measures for the assessment and registration of that information.

3. States shall, where appropriate, exchange this information with the competent authorities of other interested States, in particular the State whose nationals reported the discovery. Such information shall be transmitted to UNESCO.

4. States may authorize protective interventions and scientific research of the discovered underwater cultural heritage. To this end they shall consult the competent authorities of a State whose nationals or vessels flying its flag intend to engage in such activity and shall ensure that such activity:

(a) complies, at a minimum, with the Rules of the Annex;

---

12 It was understood that these agreements would have to be consistent with international law.

** *Chairman's note: Articles 5 and 6 of the draft are included in a single Article in Option 3. Article 7 of the draft becomes Article 6 in Option 3.*

13 The need was also noted to reflect on how to notify discoveries made in areas which are subject to conflicting claims.

(b) involves the participation of competent experts of the State Party in whose exclusive economic zone or on whose continental shelf the discovered underwater cultural heritage is located.

5. States Parties shall prohibit:

(a) any activity [directed at] underwater cultural heritage which is in violation of paragraphs 1, 2, 3 and 4; or

(b) the use of its territory, including its maritime ports and off-shore terminals, or other area under its jurisdiction such as the continental shelf or exclusive economic zone, in support of any activity [directed at] underwater cultural heritage which is in violation of paragraphs 1, 2, 3 and 4.

Article 6

Prohibition of certain activities by nationals and ships

All States Parties shall take all practicable measures to ensure that [their nationals] and vessels flying their flag do not engage in any activity [directed at] underwater cultural heritage in a manner inconsistent with this Convention and its Annex, or the laws and regulations of the State Party in whose exclusive economic zone or on whose continental shelf such underwater cultural heritage is located, as appropriate.

Article 7

Underwater cultural heritage in the area

1. Any discovery of underwater cultural heritage in the area, as defined in Article 1, paragraph 1(1) of the United Nations Convention on the Law of the Sea, shall be reported [by the State Party whose nationals or vessels flying its flag made such discovery to the Director-General of UNESCO, who in turn shall transmit such information to the Secretary-General of the International Seabed Authority as soon as possible.]

2. [UNESCO shall inform of the discovery all States that enjoy preferential rights under Article 149 of the United Nations Convention on the Law of the Sea.]]

(End of the three options)

[Article 7 bis

Underwater cultural heritage in the area

Any discovery of underwater cultural heritage in the area, as defined in Article 1, paragraph (1) of the United Nations Convention on the Law of the Sea, shall be reported by the finder to the Secretary-General of the International Seabed Authority, which shall transmit the information to the Director-General of the United Nations Educational, Scientific and Cultural Organization.]***

[Article X

Activities incidentally affecting underwater cultural heritage**

1. Each State Party shall take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf.

*** *Chairman's note: this Article is the old Article 14 and would apply if Option 1 or 2 is accepted. Option 3 contains an alternative proposal on the "Area" in its Article 7.*

**** *Chairman's note: if Article X is accepted, it would logically precede Article 7 in Option 3.*

2. Where a State Party designates as requiring special protection underwater cultural heritage in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf, it shall take all necessary measures to ensure that activities do not adversely affect such underwater cultural heritage.

3. Where UNESCO designates as requiring special protection underwater cultural heritage in the Area, each State Party shall take all necessary measures to ensure that vessels flying its flag do not undertake activities that adversely affect such underwater cultural heritage.]

Article 8

Permits

A State Party may [issue] ~~provide for the issuance of~~ permits, subject to compliance with [the Rules of the Annex], allowing entry into its territory of underwater cultural heritage.

~~Should an excavation or retrieval of underwater cultural heritage occur without a prior authorisation of a State Party, the State Party may issue permits allowing entry of such underwater cultural heritage into its territory, provided that excavation and retrieval activities have been conducted in accordance with the operative provisions of the Charter.~~

Article 9

Seizure of underwater cultural heritage

1. Subject to Article 8, each State Party shall provide for the seizure of underwater cultural heritage excavated or retrieved in a manner not in conformity with the Rules of the Annex, which is brought to its territory. ~~either directly or indirectly.~~

[2. A State shall seize underwater cultural heritage known to have been excavated or retrieved from the exclusive economic zone or the continental shelf of another State Party exercising control of those areas in accordance with Article 5, paragraphs 2 to 5 above only after the request or with the consent of that State.]

Article 10

Other sanctions

1. Each State Party shall impose criminal, administrative [or civil] sanctions for importation of underwater cultural heritage which is subject to seizure under Article 9.

2. State Parties [shall] ~~agree to~~ cooperate with each other in the enforcement of these sanctions. ~~Such cooperation shall include, but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition.~~

Article 11

Notification requirements and treatment of seized underwater cultural heritage

1. Each State Party undertakes to record, protect and take all reasonable measures to conserve underwater cultural heritage seized under this Convention.

2. Each State Party shall notify its seizure of underwater cultural heritage under this Convention to the [Director-General of UNESCO] and to any other State Party which is known to have a cultural heritage interest therein.

Article 12

Disposition of underwater cultural heritage

1. A State Party which has seized underwater cultural heritage shall decide on its ultimate disposition for the public benefit taking into account the needs of conservation and research, including the need for re-assembly of a dispersed collection, as well as public access, exhibition and education, and the interests of those States which have expressed a national heritage interest in it [pursuant to their preferential rights as State of origin, State of cultural origin, or State of historical and archaeological origin.]

[2. States Parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives or any other reward for the excavation and removal of underwater cultural heritage.]*****

Article 13

Collaboration and information-sharing

1. Whenever a State Party has expressed a national heritage interest in particular underwater cultural heritage to another State Party, the latter shall consider collaborating in the investigation, excavation, documentation, conservation, study and cultural promotion of the heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, such as but not limited to, discovery of heritage, location of heritage, heritage excavated or retrieved contrary to [the Rules of the Annex] or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to heritage.

3. Whenever feasible, each State Party shall use appropriate international databases to disseminate information about underwater cultural heritage excavated or retrieved contrary to [the Rules of the Annex] or otherwise in violation of international law.

Article 14

Underwater cultural heritage in the area******

Article 15

Education

Each State Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex.

Article 16

Training in underwater archaeology

1. States Parties shall take measures to further research in accordance with [the Rules of the Annex] by providing training in underwater archaeological investigation and excavation methods and in techniques for the conservation of underwater cultural heritage, or by encouraging the competent bodies or organizations to do so.

[2. States Parties shall cooperate to promote training and transfer of technology relating to underwater cultural heritage.]

***** *Chairman's note: to be deleted here as it is part of the Annex and/or Article 3 of the General Principles.*

****** *See Chairman's note marked *** on page 9 of the draft Convention.*

Article 17

Assistance of UNESCO

1. States Parties may call upon UNESCO for technical assistance concerning underwater cultural heritage as regards information and education, consultation and expert advice, coordination and good offices, [or in connection with any [technical] problem arising out of the application of the present Convention or the Rules of the Annex.]

~~2. The Organization shall accord such assistance within the limits fixed by its programme and by its resources.~~

[~~3~~2. The Organization may, on its own initiative, conduct research and publish studies on matters relevant to the protection of the underwater cultural heritage.]

[3. The Organization shall inform States Parties on activities directed at cultural heritage.]

Article 18

National services

~~1.~~ In order to ensure effective implementation of this Convention, States Parties undertake to expand the activities of existing competent national services or, if appropriate, to establish national services for that purpose.

~~2. National services should actively encourage the participation of interested persons in preservation and study of the underwater cultural heritage and in support of archaeological research. This participation is subject to the authorization and control of the national service concerned and must respect the operative provisions of the Charter.~~

~~3. States Parties shall establish an internal procedure or procedures for resolving disputes concerning whether or not an activity affecting underwater cultural heritage is in conformity with the operative provisions of the Charter.~~

Article 19

Peaceful settlement of disputes

Any dispute between two or more States Parties concerning the interpretation or application of the present Convention or the Rules of the Annex and not settled by negotiation shall, at the request of any of the parties to the dispute, be submitted to arbitration. If the States Parties are unable to agree on the constitution of the arbitral tribunal within six months from the date of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

Article 20

Ratification, acceptance, approval or accession

1. Member States of UNESCO, as well as non-Member States of UNESCO which have been invited by the Executive Board of UNESCO to become Parties, may become Parties to this Convention by depositing with the Director-General of UNESCO an instrument of ratification, acceptance, approval or accession.

2. The Convention shall enter into force three months after the deposit of the fifth instrument referred to in paragraph 1, but solely with respect to the five States that have so deposited their instruments. It shall enter into force for each other State three months after that State has deposited its instrument.

Article 21

Reservations and exceptions

No reservations or exceptions may be made to this Convention.

Article 22

Amendments

1. A State Party may, by written communication addressed to the Director-General of UNESCO, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the General Conference of UNESCO for adoption.

2. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties, unless otherwise provided in the amendment itself.

3. Articles 20, 21 and 23 shall apply to all amendments to this Convention.

4. Amendments to this Convention shall enter into force for the States Parties accepting or acceding to them three months after the deposit of the instruments referred to in paragraph 2 by two thirds of the States Parties. Thereafter, for each other State Party it shall enter into force three months after the deposit of its instrument.

5. An amendment may provide that a smaller or a larger number of acceptances or accessions shall be required for its entry into force than are required by this Article.

6. A State which becomes a Party to this Convention after the entry into force of amendments in accordance with paragraph 4 shall, failing an expression of different intention by that State:

(a) be considered as a Party to this Convention as so amended; and

(b) be considered as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 23

Denunciation

1. A State Party may, by written notification addressed to the Director-General of UNESCO, denounce this Convention.

2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.

Article 24

The Charter*******

1. The Charter annexed to this Convention form an integral part of it, and, unless expressly provided otherwise, a reference to this Convention or to one of its Parts includes a reference to the Rules of the Annex relating thereto.

2. The Charter may be revised from time to time by the International Council of Monuments and Sites. Revisions of the operative provisions shall be deemed to be revisions of the annexed operative provisions. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall notify all States Party to this Convention of the text of such revisions. States Parties shall be bound by the revisions, except those State Parties that notify the depository of their non-acceptance in writing.

******* *Chairman's note: this Article will need revision to make it compatible with the decision to replace the words "operative provisions of the Charter" by the words "Rules of the Annex" throughout the text.*

Such notification shall be made within six months after the receipt of the notification of the text of revisions.

3. A State which becomes a Party to this Convention after the adoption of amendments to the Rules of the Annex in accordance with paragraph 2 shall:

(a) be considered to have accepted the Rules of the Annex as so amended; and

(b) be considered as having accepted the unamended Rules of the Annex in relation to any State Party not bound by the amendments to the Rules of the Annex.

Article 25

Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

ANNEX

RULES CONCERNING ACTIVITIES DIRECTED AT UNDERWATER CULTURAL HERITAGE

I. General principles

1. The protection of underwater cultural heritage is best achieved through *in situ* preservation, which should be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized by the competent authority of the concerned State only when they make a significant contribution to knowledge, protection and [/or] enhancement of underwater cultural heritage.

2. The commercial exploitation of underwater cultural heritage for trade or speculation [, other than in the provision of services] or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of the underwater cultural heritage. Underwater cultural heritage shall ~~[should]~~ not be traded, sold, bought and bartered as items of commercial value.

3. Activities directed at underwater cultural heritage shall not adversely impact underwater cultural heritage more than is necessary for the objectives of the project.

4. Activities directed at underwater cultural heritage must use non-destructive techniques and prospection and [limited] sampling in preference to recovery of objects. [If excavation is necessary for the purpose of scientific studies,] the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of historical, cultural and archaeological information.

7. Public access to conduct activities relating to underwater cultural heritage that are non-intrusive (such as photography) should, where practicable, be encouraged.

II. Project design

8. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authority for authorization and appropriate peer review.

9. The project design shall include:

(a) proposals for, or results of, all preliminary work as appropriate;

(b) the objectives of the project;

(c) the methodology to be used and the techniques to be employed;

(d) the anticipated funding;

(e) a timetable for completion of the project;

(f) composition, qualifications, responsibility and experience of the team;

(g) plans for post-fieldwork analysis and other activities;

(h) a conservation programme for artefacts and the site in close cooperation with the competent authority;

(i) site management and maintenance policy for the whole duration of the project;

(j) a documentation programme;

(k) a safety policy;

(l) arrangements for collaboration with museums and other, in particular scientific, institutions;

(m) report preparation;

(n) deposition of archives, including underwater cultural heritage removed; and

(o) a programme for publication.

10. Activities [directed at underwater cultural heritage] shall be carried out in accordance with the project design approved by the competent authority.

11. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authority.

12. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage including conservation measures or activities for a period of short duration, including in particular site stabilization, may be authorized in the absence of a project design to protect underwater cultural heritage.

III. Preliminary work

13. The preliminary work referred to in Chapter II shall include an assessment that evaluates the [scientific significance and] vulnerability of the underwater cultural heritage and surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project's objectives.

14. The assessment shall also encompass background studies of available historical and archaeological evidence, archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

15. The methodology shall comply with the project's objectives and the techniques employed shall be as non-intrusive as possible.

V. Funding

16. ~~[~~Except in cases of emergency to protect underwater cultural heritage~~]~~, adequate funding shall ~~should~~ be assured in advance of any activity sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

17. The project design shall exhibit demonstrated ability (such as securing a bond) to fund the project through to completion.

18. The project design shall include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

19. Project funding shall [should] not require the sale, acquisition or barter of underwater cultural heritage.

VI. Project duration - Timetable

20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, and report preparation and dissemination.

21. The project design shall include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption in or termination of the anticipated timetable.

VII. Competence and qualifications

22. Activities directed at underwater cultural heritage shall only be undertaken under the direction of and in the presence [in control] of a qualified underwater archaeologist with scientific competence appropriate to the project.[14]

23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their project roles.

VIII. Conservation and site management

24. The conservation programme shall provide for treatment of the archaeological remains during the activities directed at underwater cultural heritage, in transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

25. The site management programme shall provide for the protection and management *in situ* for underwater cultural heritage in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring and protection against interference.

IX. Documentation

26. The documentation programme shall set out thorough documentation of activities, including a progress report directed at underwater cultural heritage in accordance with current professional standards of archaeological documentation.

27. Documentation shall include, at a minimum, a comprehensive record of the site including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, photographs and recording in other media.

X. Safety

28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project's team and third parties and is consistent with any applicable statutory and professional requirements.

XI. Reporting

29. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

30. Reports shall include:

(a) an account of the objectives;

(b) an account of the methods and techniques employed;

(c) an account of the results achieved;

(d) recommendations concerning conservation and curation of any underwater cultural heritage removed as well as of the site; and

(e) recommendations for future activities; [and]

[(f) basic graphic and photographic documentation on all phases of the activity.]

XII. Curation of project archive

31. The project archive, including any underwater cultural heritage removed and a copy of all supporting documentation, should [shall] as much as possible be kept together and intact as a collection in a manner that

---

[14] This provision was accepted in principle on the basis that "activities directed at underwater cultural heritage" shall be defined so as to exclude non-destructive activities.

can [be available] provide for scientific and public access as well as the curation of the archive [within at least five years of the completion of the archaeological fieldwork].

32. Arrangements for curation of the project archive shall be agreed to before any activity commences, and shall be set out in the project design.

33. The project archive shall be prepared according to current professional standards.

XIII. Dissemination

34. Projects shall provide for public education and popular presentation of their results.

35. A final synthesis of a project shall be:

(a) made public as soon as possible, having regard to the complexity of the project; and

(b) deposited in relevant national records.

XIV. International Cooperation

[36. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.][15]

[15] It has still to be considered whether the subject of international cooperation should be placed in the Rules of the Annex or the text of the Convention.

Appendix V

Comparison between the 'Rules Concerning [Activities Directed at] Underwater cultural Heritage' and the 'ICOMOS Charter on the Protection and Management of the Underwater Cultural Heritage'[1]

Introduction

The *Rules concerning [activities directed at] underwater cultural heritage* are based on the ICOMOS Charter. It is set out here as it was agreed on the 7 July 2000 at the conclusion of the third meeting of Governmental experts, held at UNESCO headquarters, Paris, 3-7 July 2000. The ICOMOS articles on which the article of the 'Rules' was based appear below the relevant article in italics. The introduction to the ICOMOS Charter is also reproduced below in italics.

Introduction to ICOMOS draft

This Charter is intended to encourage the protection and management of underwater cultural heritage in inland and inshore waters, in shallow seas and in the deep oceans. It focuses on the specific attributes and circumstances of cultural heritage under water and should be understood as a supplement to the ICOMOS Charter for the Protection and Management of Archaeological Heritage, 1990. The 1990 Charter defines the "archaeological heritage" as that part of the material heritage in respect of which archaeological methods provide primary information, comprising all vestiges of human existence and consisting of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds, together with all the portable cultural material associated with them. For the purposes of this Charter underwater cultural heritage is understood to mean the archaeological heritage which is in, or has been removed from, an underwater environment. It includes submerged sites and structures, wreck-sites and wreckage and their archaeological and natural context.

By its very character the underwater cultural heritage is an international resource. A large part of the underwater cultural heritage is located in an international setting and derives from international trade and communication in which ships and their contents are lost at a distance from their origin or destination.

Archaeology is concerned with environmental conservation; in the language of resource management, underwater cultural heritage is both finite and non-renewable. If underwater cultural heritage is to contribute to our appreciation of the environment in the future, then we have to take individual and collective responsibility in the present for ensuring its continued survival.

Archaeology is a public activity; everybody is entitled to draw upon the past in informing their own lives, and every effort to curtail knowledge of the past is an infringement of personal autonomy. Underwater cultural heritage contributes to the formation of identity and can be important to people's sense of community. If managed sensitively, underwater cultural heritage can play a positive role in the promotion of recreation and tourism.

Archaeology is driven by research, it adds to knowledge of the diversity of human culture through the ages and it provides new and challenging ideas about life in the past. Such knowledge and ideas contribute to understanding life today and, thereby, to anticipating future challenges. Many marine activities, which are themselves beneficial and desirable, can have unfortunate consequences for underwater cultural heritage if their effects are not foreseen.

Underwater cultural heritage may be threatened by construction work that alters the shore and seabed or alters the flow of current, sediment and pollutants. Underwater cultural heritage may also be threatened by insensitive exploitation of living and non-living resources. Furthermore, inappropriate forms of access and the incremental impact of removing "souvenirs" can have a deleterious effect.

Many of these threats can be removed or substantially reduced by early consultation with archaeologists and by implementing mitigatory projects. This Charter is intended to assist in bringing a

[1] Ratified by the 11th ICOMOS General Assembly, held in Sofia, Bulgaria, from 5-9 October 1996

high standard of archaeological expertise to bear on such threats to underwater cultural heritage in a prompt and efficient manner.

Underwater cultural heritage is also threatened by activities that are wholly undesirable because they are intended to profit few at the expense of many. Commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage. This Charter is intended to ensure that all investigations are explicit in their aims, methodology and anticipated results so that the intention of each project is transparent to all.

Rules Concerning [Activities Directed at] Underwater cultural Heritage

I. General Principles

1. The protection of underwater cultural heritage is best achieved through in situ preservation. which should be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorised by the competent authority of the concerned State only when they make a significant contribution to knowledge, protection and/or[2] enhancement of underwater cultural heritage.

2. the commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the underwater cultural heritage. This Rule is without prejudice to the provision, to a project being conducted in accordance with the Convention, of professional archaeological services or services incidental thereto whose nature and purposes are fully consistant with the Convention and the Annex. Underwater cultural heritage shall [should] not be traded, sold, bought and bartered as items of commercial value.

3. Activities directed at underwater cultural heritage shall not adversely impact underwater cultural heritage more than is necessary for the objectives of the project.

4. Activities directed at underwater cultural heritage must use non-destructive techniques and prospection and sampling in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection[3] of underwater cultural heritage, the methods and techniques must be as non-destructive as possible and contribute to the preservation of the remains.

5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of historical, cultural and archaeological information.

7. Public access to conduct activities relating to underwater cultural heritage and to its archaeological context that are non-intrusive and are consistant with its conservation should, where practicable, be encouraged.

8. International co-operation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

ICOMOS Article 1 - Fundamental Principles

The preservation of underwater cultural heritage in situ should be considered as a first option.
Public access should be encouraged.
Non-destructive techniques, non-intrusive survey and sampling should be encouraged in preference to excavation.
Investigation must not adversely impact the underwater cultural heritage more than is

---

[2] The Canadian delegation considered that a conjunctive interpretation of the term 'contribution to knowledge, protection and/or enhancement of UCH' would be too enerous a burden of proof for the State and proposed the use of the term 'or' rather than 'and/or'. (1999 meeting)

[3] It was agreed to note that 'ultimate protection' is understood to mean protective measures of last resort required to ensure the survival of the underwater cultural heritage. CLT-2000/CONF.201/10 Paris, 7 July 2000

necessary for the mitigatory or research objectives of the project.
Investigation must avoid unnecessary disturbance of human remains or venerated sites.
Investigation must be accompanied by adequate documentation.

ICOMOS Article 15 - International co-operation

International co-operation is essential for protection and management of underwater cultural heritage and should be promoted in the interests of high standards of investigation and research. International co-operation should be encouraged in order to make effective use of archaeologists and other professionals who are specialised in investigations of underwater cultural heritage. Programmes for exchange of professionals should be considered as a means of disseminating best practice.

II. Project Design

9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authority for authorisation and appropriate peer review.

10. The project shall include;

a. evaluation of previous or preliminary studies
b. project statement and onjectives
c. the methodology to be used and the techniques to be employed
d. anticipated funding;
e. an expected timetable for completion of the project;
f. the composition, qualifications, responsibility and experience of the investigating team;
g. planes for post-filed work analysis and other activities;
h. a conservation program for artefacts and the site in close co-operation with the competent authority;
i. site management and maintenance policy for the whole duration of the project;
j. a documentation program
k. a safety policy
l. an environmental ploicy
m. arrangements for collaboration with museums and other, in particular, scientific institutions;
n. report preparation;
o. deposition of archives, including underwater cultural heritage removed; and
p. a program for publication.

11. Activities direct at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authority

12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authority

13. In cases of urgency or chance discoveries, conservation measures or activities for a period of short duration, including in particular site stabilisation, may be authorised in the absence of a project design to protect underwater cultural heritage[4].

ICOMOS Article 2 - Project Design

Prior to investigation a project must be prepared, taking into account :

the mitigatory or research objectives of the project;
the methodology to be used and the techniques to be employed;
anticipated funding;
the time-table for completing the project;

---

[4] Typing error correction "conservation" instead of "conservatory" which appear in CLT.99/CONF.204/CLD.8

the composition, qualifications, responsibility and experience of the investigating team;
material conservation;
site management and maintenance;
arrangements for collaboration with museums and other institutions;
documentation;
health and safety;
report preparation;
deposition of archives, including underwater cultural heritage removed during investigation;
dissemination, including public participation.

The project design should be revised and amended as necessary.
Investigation must be carried out in accordance with the project design. The project design should be made available to the archaeological community.

III. Preliminary Work

14. The preliminary work referred to in Rule 9(a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project's objectives.

15. The assessment shall also encompass background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site and the consequences of any potential intrusion for the long term stability of the underwater cultural heritage affected by investigations.

ICOMOS Article 7 - Preliminary investigation

All intrusive investigations of underwater cultural heritage must be preceded and informed by a site assessment that evaluates the vulnerability, significance and potential of the site.

The site assessment must encompass background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site and the consequences of the intrusion for the long term stability of the area affected by investigations.

IV. Project Objective, Methodology and Techniques

16. The methodology shall comply with the project's objectives and the techniques employed shall be as non-intrusive as possible.

ICOMOS Article 5- Research objectives, methodology and techniques

Research objectives and the details of the methodology and techniques to be employed must be set down in the project design. The methodology should accord with the research objectives of the investigation and the techniques employed must be as unintrusive as possible.

Post-fieldwork analysis of artefacts and documentation is integral to all investigation; adequate provision for this analysis must be made in the project design.

V. Funding

17. Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of the activity to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

18. The project design shall exhibit demonstrated ability (such as securing a bond) to fund the project through completion.

19. the project design shall include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

20. Project design shall not require the sale, acquisition or barter of underwater cultural heritage.

ICOMOS Article 3 - Funding

Adequate funds must be assured in advance of investigation to complete all stages of the project design including conservation, report preparation and dissemination. The project design should include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption in anticipated funding.

Project funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be irretrievably dispersed.

VI. Project Duration - Timetable

21. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the complete all stages of the project design including conservation, documentation and curation of recovered underwater cultural heritage, and report preparation and dissemination

22. The project design shall include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption in or termination of the anticipated funding.

ICOMOS Article 4 - Time-table

Adequate time must be assured in advance of investigation to complete all stages of the project design including conservation, report preparation and dissemination. The project design should include contingency plans that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption in anticipated timings.

VII. Competence and Qualifications

23. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of a qualified underwater archaeologist with scientific competence appropriate to the project.

24. All persons on the project team shall be qualified and have demonstrated competence appropriate to their project roles.

ICOMOS Article 6 - Qualifications, responsibility and experience

All persons on the investigating team must be suitably qualified and experienced for their project roles. They must be fully briefed and understand the work required.

All intrusive investigations of underwater cultural heritage will only be undertaken under the direction and control of a named underwater archaeologist with recognised qualifications and experience appropriate to the investigation.

VIII. Conservation and Site Management

25. The conservation program shall provide for treatment of the archaeological remains during the activities directed at underwater cultural heritage, in transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

26. The site management programme shall provide for the protection and management in situ for underwater cultural heritage in the course of an upon termination of fieldwork. The programme should include public information, reasonable provision for site stabilisation, monitoring and protection against interference.

ICOMOS Article 9 - Material conservation

The material conservation programme must provide for treatment of archaeological remains during investigation, in transit and in the long term.
Material conservation must be carried out in accordance with current professional standards.

ICOMOS Article 10 - Site management and maintenance

A programme of site management must be prepared, detailing measures for protecting and managing in situ underwater cultural heritage in the course of an upon termination of fieldwork. The programme should include public information, reasonable provision for site stabilisation, monitoring and protection against interference. Public access to in situ underwater cultural heritage should be promoted, except where access is incompatible with protection and management.

IX. Documentation

27. The documentation program shall set out thorough documentation of activities, including a progress report directed at underwater cultural heritage in accordance with current professional standards of archaeological documentation.

28. Documentation shall include, at a minimum, a comprehensive record of the site, which includes the provenance of underwater cultural heritage moved or removed in the course of activities directed at underwater cultural heritage, field notes, plans, drawings, photographs and records in other media.

ICOMOS Article 8 - Documentation

All investigation must be thoroughly documented in accordance with current professional standards of archaeological documentation.

Documentation must provide a comprehensive record of the site, which includes the provenance of underwater cultural heritage moved or removed in the course of investigation, field notes, plans and drawings, photographs and records in other media.

X. Safety

29. A safety policy shall be prepared that is adequate to ensure the safety and health of the project' team and third parties and is consistent with any applicable statutory and professional requirements.

ICOMOS Article 11 - Health and safety

The health and safety of the investigating team and third parties is paramount. All persons on the investigating team must work according to a safety policy that satisfies relevant statutory and professional requirements and is set out in the project design.

XI. Environment

30. AN environmental policy sahll be prepared that is adequate to ensure that the sea bed and marine life are not unduly disturbed.

XII. Reporting

31. Interim and final reports shall be made available according to a timetable set out in the project design, and deposited in relevant public records

32. The report shall include

a. an account of the objectives;
b. an account of the methodology and techniques employed;
c. an account of the results achieved;
d. the required photography and graphs related to all the phases of intervention
e. recommendations concerning conservation and curation of any underwater cultural heritage removed as well the site;
f. recommendation for future activities

ICOMOS Article 12 - Reporting

Interim reports should be made available according to a time-table set out in the project design, and deposited in relevant public records.

Reports should include :

an account of the objectives;
an account of the methodology and techniques employed;
an account of the results achieved;
recommendations concerning future research, site management and curation of underwater cultural heritage removed during the investigation.

XIII. Curation of Project Archive

33. The project archive, including any underwater cultural heritage removed and a copy of all supporting documentation shall as much as possible be kept together and intact as a collection in a manner that is available for professional and public access (as well as the curation of the archive) as rapidly as possible and not later than 10 years from the completion of the project; in so far as may be compatible with [intellectual property rights and] conservation of underwater cultural heritage.

34. Arrangements for curation of the project shall be agreed before any activity commences, and shall be set out in the project design.

35. The project archive shall be prepared according to current professional standards.

ICOMOS Article 13 - Curation

The project archive, which includes underwater cultural heritage removed during investigation and a copy of all supporting documentation, must be deposited in an institution that can provide for public access and permanent curation of the archive. Arrangements for deposition of the archive should be agreed before investigation commences, and should be set out in the project design. The archive should be prepared in accordance with current professional standards.

The scientific integrity of the project archive must be assured; deposition in a number of institutions must not preclude reassembly to allow further research. Underwater cultural heritage is not to be traded as items of commercial value.

XIV. Dissemination

36. Projects shall provide for public education and popular presentation of their results

37. A final synthesis of a project shall be;

a. made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and
b. deposited in relevant national records.

ICOMOS Article 14 - Dissemination

Public awareness of the results of investigations and the significance of underwater cultural heritage should be promoted through popular presentation in a range of media. Access to such presentations by a wide audience should not be prejudiced by high charges.

Co-operation with local communities and groups is to be encouraged, as is co-operation with communities and groups that are particularly associated with the underwater cultural heritage concerned. It is desirable that investigations proceed with the consent and endorsement of such communities and groups.

The investigation team will seek to involve communities and interest groups in investigations to the extent that such involvement is compatible with protection and management. Where practical, the investigation team should provide opportunities for the public to develop archaeological skills through training and education.

Collaboration with museums and other institutions is to be encouraged. Provision for visits, research and reports by collaborating institutions should be made in advance of investigation.
A final synthesis of the investigation must be made available as soon as possible, having regard to the complexity of the research, and deposited in relevant public records.

Appendix VI

States Comments on the ILA and UNESCO drafts of the Draft Convention on the Protection of the Underwater Cultural Heritage

This appendix includes a number of comments made by State representatives on the ILA and UNESCO versions of the draft Convention on the Protection of the Underwater Cultural Heritage. These comments are a selection which best represent State attitudes to various key principles in the drafts submitted on or before the third Meeting of Governmental Experts held at UNESCO Headquarters. Paris, 3-7 July 2000. However, the comments are largely those general statements made prior to the direct input of States into the drafting process, and therefore represent responses to either the ILA draft or the secretariat draft of the UNESCO draft Convention.

General

Australia
"There is therefore an urgent need for an international instrument for the protection of the underwater cultural heritage and Australia considers UNESCO to be the institution best placed to prepare such an instrument."[1]

"Australia strongly supports international co-operation to protect underwater cultural and to develop agreed research protocols, as a means of safeguarding the contribution of shipwrecks to a fuller understanding of the past."[2]

Canada
"Canada agrees with the international community on the need to have an international instrument which could take the form of a convention."[3]

Columbia
"The Government of Columbia applauds the idea of extending and specifying the terms and conditions of the underwater cultural heritage..."[4]

Germany
"The objective of protecting archaeological and historical objects found on the sea-bed as comprehensively and effectively as possible is welcomed by Germany and is not contended as a general principle within the international community."[5]

Greece
"Greece is naturally in favour of the adoption of a convention on archaeological objects found at sea designed to be universal in scope and aimed at regulating the matter in detail."[6]

Malta
"Malta fully supports UNESCO's initiative and endeavours in favour of the elaboration of a convention..."[7]

Norway
"Norway reserves her position with regard to the desirability of the proposed Convention on Underwater Cultural Heritage under preparation at the UNESCO."[8]

---

[1] Doc. 28C/39 Add, Paris, 31 October 1995
[2] Doc. 29C/22 Annex II, Paris, 5 August 1997
[3] Doc. 29C/22 Annex II, Paris, 5 August 1997
[4] Doc. 28C/39 Add, Paris, 31 October 1995
[5] Doc. 28C/39 Annex, Paris, 4 October 1995
[6] Doc. 28C/39 Annex, Paris, 4 October 1995
[7] *Comments of Malta Concerning the Draft Convention on the Protection of the Underwater Cultural Heritage*, presented at the 2000 meeting, 3 July 2000

Philippines
"... UNESCO remains to be the proper forum for discussing and adopting the international legal protection for the protection of the underwater cultural heritage."[9]

Poland
"Poland wishes to express its conviction that the adoption of international convention on the protection of underwater cultural heritage is the issue of utmost importance taking into account progressing devastation of that heritage as a result of irresponsible human activity."[10]

"The Delegation of Poland is convinced that the adoption of international convention on the protection of the underwater cultural heritage is the issues of paramount importance due to growing deterioration of that heritage as a result of unsupervised human activity"[11]

Republic of Korea
"The Republic of Korea shares the view that there is a need for a legally binding instrument for the protection of underwater cultural heritage."[12]

Spain
"Spain proposes at the international level the establishment of an instrument to unify management methods for the underwater cultural heritage..."[13]

Turkey
"Turkey is fully aware of the importance on international co-operation to achieve the protection of the underwater cultural heritage, not only in the territorial waters of a state, but also in areas under the coastal states jurisdiction and also in the 'area'"[14]

United Kingdom
"As a nation with an extensive maritime history, the United Kingdom is conscious of the need for protection of historic wrecks from uncontrolled treasure hunting: a Convention on Underwater Cultural Heritage could meet this end."[15]

States Comments on conformity with UNCLOS

France
"France stresses that the outcome of the deliberations should be consistent with the provision of the United Nations Convention on the Law of the Sea, and create neither maritime zones nor specialised rights that run counter to that provided for in the text." [16]

Germany
"Any attempt to create new categories of maritime zone entails an interference in the fundamental principle under international maritime law of the freedom of the sea enshrined in the Convention on the Law of the Sea. It is vital that the UNESCO draft[17] be in complete harmony with the convention, the universal and fundamental agreement governing all legal conditions pertaining to the seas and oceans.

---

[8]General remarks by Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of foreign Affairs, submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999.

[9] *Philippine opening Statement at the 3rd Meeting off Governmental Experts* delivered by H.E. Hector K. Vilarroel 3 July 2000

[10]Government of Poland's comments submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999

[11] Non-paper presented at the 2000 meeting.

[12] Doc. 29C/22 Annex II, Paris, 5 August 1997

[13] Doc. 28C/39 Annex, Paris, 4 October 1995

[14]Government of Turkey's comments submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999

[15] Doc. 28C/39 Annex, Paris, 4 October 1995

[16] Doc. 28C/39 Add, Paris, 31 October 1995

[17] The UNESCO secretariat did note that in fact this was not an UNESCO draft but rather an ILA draft convention.

The Convention has, after many years of effort, put an end to the many tendencies on the part of the coastal states towards almost complete 'zoning' of the seas, and has achieved a difficult balance between the various interests regarding the delimitation of the different maritime zones. This achievement cannot be jeopardised."[18]

Greece
"Greece finds it difficult to see how a special zone for the protection of the underwater cultural heritage can be established when the question has already been resolved otherwise by Article 303(2) of the United Nations Convention on the Law of the Sea.... Thus there can be no question of modifying the Convention."[19]

Italy
"The establishment of an effective protection regime for objects located on the continental shelf o within the exclusive economic zone cannot be seen as an encroachment on the freedom of the sea: not is it the creation of another jurisdictional zone."[20]

Netherlands
"For the authorities of the Netherlands, the regime applicable to the protection of underwater cultural heritage situated beyond areas of national jurisdiction is a present considered inadequate. A better protection of such archaeological and historical objects in areas beyond jurisdiction is necessary and urgent while at the same time maintaining the delicate balance achieved in the 1982 United Nations Convention on the Law of the Sea"[21]

Norway
"Any new regulations for the protection of underwater cultural heritage must be in full conformity with the relevant provisions of UNCLOS, including those concerning the sovereign rights and jurisdictions of the coastal states and the rights and duties of the flag State"[22]

"It is of paramount importance to avoid any new regulation that could disturb the carefully balanced package of jurisdiction in maritime zones reflected in the UNCLOS."[23]

Philippines
"...the Philippines lauds every effort to bring this draft Convention in line with the provisions of the UN Convention on the Law of the Sea (UNCLOS). ... the Philippines submits that the proper jurisdictional regime relies on the coastal state's regulatory jurisdiction over underwater cultural heritage in the exclusive economic zone and on the continental shelf."[24]

Poland
"The Delegation of Poland is of the view, that strict consistence between drafted convention and the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) must be assured"[25]

"The Delegation supports the concept of extension of responsibility of coastal states to the underwater cultural heritage within their exclusive economic zone."[26]

---

[18] Doc. 29C/22 Annex II, Paris, 5 August 1997

[19] Doc. 29C/22 Annex II, Paris, 5 August 1997

[20] *Comments of the Government of Italy*, presented at the 2000 meeting, 3 July 2000

[21] Doc. 28C/39 Annex, Paris, 4 October 1995

[22] General remarks by Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of foreign Affairs, submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999.

[23] General remarks by Mr. Hans Wilhelm Longva, Director General, Department of Legal Affairs, Royal Norwegian Ministry of foreign Affairs, submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999.

[24] *Philippine opening Statement at the 3rd Meeting off Governmental Experts* delivered by H.E. Hector K. Vilarroel 3 July 2000

[25] Non-paper presented at the 2000 meeting.

[26] Non-paper presented at the 2000 meeting

Republic of Korea
" ... appropriate efforts should be made to harmonise the national jurisdiction, port-state jurisdiction and coastal state jurisdiction in conformity with UNCLOS..."[27]

The United Kingdom
"The United Kingdom would, however, be wary of upsetting the jurisdictional package in the United Nations Convention on the Law of the Sea..."[28]

"The United Kingdom believes that the objective of this process should be to give clear guidance to States on how to implement their duty under the UN Convention on the Law of the Sea to protect objects off an archaeological and historical nature found at sea: the underwater cultural heritage."[29]

United States
"The United States believes that the regulation of underwater cultural heritage should be consistent with the allocation of rights and duties of States set out in the Law of the Sea Convention, particularly with regard to fishing, protection of the marine environment, the laying of submarine cables and pipelines, the establishment and use of artificial islands, installations and structures, and marine scientific research."[30]

States comments on the exclusion of salvage law

Poland
"Treasure-hunting causes immense destruction and requires constant and determined action to curtail or halt."[31]

"The international responsibility for the preservation of common underwater cultural heritage for the benefit of mankind as well as common international responsibility for the prevention of commercial exploitation of that heritage be the basic principle of the convention."[32]

Italy
"Italy believes that the law of salvage and finds must not apply to objects of an archaeological and historical nature and that no reservation to allow its application is to be included in the text of the convention."[33]

Spain
"...the underwater cultural heritage should be included in the public domain to avoid its commercial exploitation and spoliation..."[34]

Tunisia
"The commercial value of the archaeological objects should not be the motive for their recovery and the right to explore underwater cultural heritage sites should only be accorded to official bodies."[35]

States comments on the exclusion of warships and other States vessels used for no-commercial purposes

Canada
"Canada takes the position that warships should be covered by the proposed convention, but only if there had been an express renunciation of the ownership rights of the flag State."[36]

Poland
"Warships of the period before 1945 (at least) contain historical information unobtainable from other sources and must be protected from looting and uncontrolled 'salvage' operations."[37]

---

[27] Doc. 29C/22 Annex II, Paris, 5 August 1997
[28] Doc. 28C/39 Annex, Paris, 4 October 1995
[29] Comments of the UK presented at the 2000 meeting, 3 July 2000
[30] CLT-99/CONF.202/5 Rev April 1999
[31] Doc. 29C/22 Annex II, Paris, 5 August 1997
[32] Non-paper presented at the 2000 meeting, 3 July 2000.
[33] *Comments of the Government of Italy*, presented at the 2000 meeting, 3 July 2000
[34] Doc. 28C/39 Annex, Paris, 4 October 1995
[35] Doc. 29C/22 Annex II, Paris, 5 August 1997
[36] Comments of Canada, presented at the 1999 meeting, 19 April 1999

Republic of Korea
"The definition of 'warships' to be excluded should be restricted to 'warships' in the narrowest sense. A time-limit should also be set, such as 100 years, in order to allow the inclusion of warships."[38]

Tunisia
"While the rule in international conventions is to exclude warships, an age criteria should limit this exception."[39]

United States
"The US believes the Convention should apply to vessels and aircraft entitled to sovereign immunity that meet the definition of UCH."[40]

International co-operation, education and regional agreements

Italy
"Italy, bearing the example of the Mediterranean Sea in mind, proposed that more stringent rules may be adopted at the regional level under agreements open to the participation of States of cultural, historical or archaeological origin."[41]

Poland
"This Delegation is of the opinion, that the international co-operation and education are crucial for the success of the convention."[42]

United Kingdom
"In order to achieve effective co-operation for the protection of underwater cultural heritage, it is essential that there is the widest possible sharing of information among all interested states. Based on such information, regional agreements, which would be tailored to specific contexts, should be the main vehicle for achieving the objective of the draft convention to achieve implementation by states of their duty to protect underwater cultural heritage."[43]

---

[37] Doc. 29C/22 Annex II, Paris, 5 August 1997
[38] Doc. 29C/22 Annex II, Paris, 5 August 1997
[39] Doc. 29C/22 Annex II, Paris, 5 August 1997
[40] US Comments submitted to the Inter-Governmental Meeting of Experts, Paris, 19-24 April 1999
[41] *Comments of the Government of Italy*, presented at the 2000 meeting, 3 July 2000
[42] Non-paper presented at the 2000 meeting, 3 July 2000
[43] Comments of the UK presented at the 2000 meeting, 3 July 2000

Appendix VII

Overview of regional and international agreements on the protection of cultural heritage

Introduction

The importance of the cultural heritage has lead to the promulgation of protective regimes at national, regional and international levels. The principle international conventions protecting cultural heritage have been adopted under the auspices of UNESCO, which has, from its inception in 1945, held the mandate in the application of protective standards relating to the cultural heritage.[1] UNESCO has adopted three principle conventions and a number of recommendations. These, together with regional agreements, will be considered below.

1.International Protection

A. Conventions

1954 UNESCO Convention on the Protection of Cultural Heritage in the Event of Armed Conflict[2]

National monuments and historical artefacts have either been destroyed or appropriated by conquering nations for centuries. Respect for religious sites had, however, been advocated since the battles of ancient Greece. From this religious perspective grew the broader recognition of the importance of all monuments, works of art, archaeological and historical artefacts.[3] The first attempt to protect cultural heritage during times of war was introduced by the Union Forces during the American Civil War, which protected works of art, libraries, scientific collection and precise instruments such as astronomical telescopes from physical destruction or expropriated by the Union Forces.[4] A number of subsequent conventions and agreements on the rules of war contained clauses protecting the cultural heritage, such as the 1874 Declaration of Brussels, which provided for the prosecution of parties responsible for the seizure, destruction or wilful damage to cultural heritage and the 1907 Convention on Laws and Customs of War on Land and the Convention Concerning Bombardment by Naval Forces in Times of War, which called for the protection of "historic monuments, art and science". The first agreement to deal solely with the protection of cultural heritage in times of war was the Treaty on the Protection of Artistic and Scientific Institutions and Monuments in 1935, referred to as the Roerich Pact. This was followed in 1939 by the League of Nations Draft International Convention for the Protection of Monuments and Works of Art in Time of War.[5] Unfortunately, before this draft could be finalised, the Nazi onslaught engulfed Europe and the systematic, planned destruction and appropriation of cultural heritage by the Nazi's began[6].

The offences against cultural heritage by the Nazi regime provided the impetus for an international conference convened at the Hague in 1954, which produced a new convention on the protection of the cultural heritage. The convention aims at protecting both movable and immovable cultural heritage which are of universal importance, irrespective or ownership or origin, during times of war.[7] The notion

---

[1] Toman, J., *The Protection of Cultural Heritage in the Event of Armed Conflict* UNESCO Publishing (1996) p. xii

[2] May 14, 1954, 294 U.N.T.S. 215. Hereafter, "1954 Hague Convention". As at the 4 August 2000, there were 99 State Parties to the Convention and 82 State parties to the Protocol.

[3] For a good introduction on the development of the protection of cultural heritage in the event of armed conflict, see Toman *op.cit* pp.1-31

[4] Merryman. J.R., "Two ways of thinking about cultural property" 80 *American Journal of International Law* (1986) p.833

[5] Merryman *op.cit* pp.834-836

[6] Toman *op.cit* p.19

[7] Strati, A., *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) Matinus Nijhoff Publishers p.8

of the cultural heritage as having a universal international character is evident from the Preamble to the convention that states;

> "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.
>
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection..."

This notion is also evident in the definition of the cultural heritage which includes objects "of great importance to the cultural heritage of every people..."[8] It is similarly evident in article 28, which requires each contracting party to undertake to impose ordinary criminal sanctions for breaches of the convention and to allow for the prosecution and imposition of penal sanctions for offenders of any nationality whatsoever. This rationale had been evident earlier during the Nuremberg trials, in which Alfred Rosenberg had been found guilty by the Allies of offences against cultural heritage. [9]

The convention requires the State in whose territory the cultural heritage is situated to take reasonable steps to protect the cultural heritage from the foreseeable effects of an armed conflict.[10] Both the State in whose territory the cultural heritage is situated and the other belligerent States have a duty to respect the cultural heritage and to refrain from using the cultural heritage in such a way as to expose it to the threat of destruction or damage[11] and to take steps to prohibit any act of vandalism, theft, pillage, misappropriation[12] or act of reprisals[13] against the cultural heritage. An element of nationalism is evident in article 4(2) that allows a belligerent State to waive the obligation to respect the cultural heritage in cases where military necessity requires it. The uncertainty of when military necessity exists in effect allows one State to determine the importance of a particular cultural heritage site, and elevates the States military requirements above the international interest in that particular cultural heritage site. The inclusion of this article was opposed by a number of States[14], arguing that it was inconsistent with the premise of the Convention. Within this regime of protection of cultural property, subject to the overriding requirement of military necessity, is the creation of a system which requires a State Party to protect the cultural heritage in its territory by establishing a service of professionals who shall secure the protection of the cultural property[15]. This protection includes the creation of a number of refuges granted special protection in which movable cultural heritage may be stored,[16] the creation of an international register of important cultural heritage, the marking of cultural heritage with a distinctive emblem[17] and special provisions for the transport of cultural heritage.[18] Contracting parties are also required to take into custody any cultural heritage imported from occupied territories and to return such property to the occupied territory at the close of hostilities[19].

Although not explicitly mentioned, the 1954 Hague Convention does provide a measure of protection for UCH found within a States internal and territorial waters.[20] UCH may therefore be protected from naval bombardment of other naval activity.[21] It is interesting to note that protection is to cover reproductions of cultural heritage of great importance, which may be particularly useful to maritime archaeology, as

---

[8] See Appendix I
[9] Merryman *op.cit* p.835
[10] Article 3
[11] Article 4(1)
[12] Article 4(3)
[13] Article 4(4)
[14] Including USSR, Greece, Rumania, Belgium and Spain
[15] Articles 7 & 15
[16] Article 8
[17] Article 10, 16 - 17
[18] Articles 12- 14
[19] Protocol for the Protection of the Cultural Property in the Event of Armed Conflict, signed at the Hague on 14 May 1954
[20] Prott, L.V., "Commentary: The 1954 Hague Convention for the protection of cultural property in the event of armed conflict " in Ronzitti, R., (ed.) *The Law of Naval Warfare* (1988) Martinus Nijhoff Publishers pp. 582-583
[21] For example, an UCH heritage site may be damaged from depth charges. During WWII, the wreck of the Lusitania was depth charged as it was thought that German U-boats were using the wreck as a source of cover. 185(4) *National Geographic* (1994) pp.68-85

there exists a great many ship reproductions[22], many of which are seagoing, and undertake voyages into other State territories, requiring these States to ensure its protection under the Convention.

The recent conflicts in the Gulf and particularly in the former Yugoslavia have again raised concerns regarding the protection of cultural heritage during times of conflict.[23] During these conflicts, UNESCO undertook a number of initiatives to protect cultural heritage. In the former Yugoslavia, UNESCO sent permanent missions to the historic cities of Dubronik, Belgrade and Zagreb. Nevertheless, Dubrovnik, and other historic cities such as Vukovar were bombed and extensively damaged[24]. Conscious of the need to introduce stronger protective measures, a second Protocol to the 1954 Hague Convention was adopted on the 26 March 1999. The protocol introduces a system of enhanced protection for objects of the "greatest importance for humanity"[25], strengthens and more clearly defines the obligation of States to impose criminal sanctions for breaches of the Protocol or Convention[26] and the establishment of the Committee for the Protection of Cultural Heritage in the Event of Armed Conflict[27].

1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import. Export and Transfer of Ownership of Cultural Property [28]

The illicit traffic, theft, clandestine excavations and illegal export or import of cultural heritage has increased dramatically over the past few decades. The demand and value of cultural heritage has resulted in a dramatic increase in illicit traffic from source countries, most commonly third world countries in Africa, Asia and South America, to the more affluent market countries of Europe and North America. The end of the era of colonialism left many nations devoid of their cultural heritage. What little remained was soon in demand by western countries and illicit trafficking increased. In an attempt to stem the flow of illicit traffic, UNESCO adopted the Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1964. As the recommendation was not binding on States, it did little to stem the flow of illicit traffic, and a number of States most affected by illicit traffic of cultural heritage[29] called for a binding international convention, which lead to the drafting of the 1970 convention.[30]

The Convention aims to protect an individual states cultural heritage, recognising that source countries have lost a great deal of their cultural heritage through illicit activities.[31] The preamble specifically requires a State to protect the cultural heritage situated in its territory and recognises the importance of the cultural heritage as "a basic element of national culture"; yet the preamble also has traces of an international perspective to the cultural heritage in recognising that the national culture is a basic element of civilisation, and that "cultural exchange between nations is necessary for scientific, cultural and educational purposes which increases the knowledge of the civilisation of man, enriches the cultural life of all people and inspires mutual respect and appreciation among nations."

---

[22] For example, the current construction of reproductions of Caligula's Roman Vessels found in Lake Nemi, Italy and the "Jonathan" of Captain Cook; Blott, J-Y., *Underwater Archaeology: Exploring the World Beneath the Sea* (1996) Thames and Hudson Ltd. p. 14. See further Delgado, J.P., *Encyclopaedia of Underwater and Maritime Archaeology* (1997) British Museum Press pp. 334-336

[23] The protection of the cultural heritage in the event of armed conflict may be subsumed under international human rights conventions. In 1994 the Council of Europe proposed that an amendment to the European Convention on Human Rights could include an article protecting cultural heritage. See further Blake, J.A., *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts with Special Reference to Turkey* (1996) Unpublished PhD Thesis, University of Dundee p. 15

[24] Examples of specific cultural heritage destroyed include the library of Sarajevo and the Ottoman bridge in Mostar, Bosnia

[25] Article 10 Second Protocol 1999

[26] Articles 15-20 Second Protocol 1999

[27] Article 24 Second Protocol 1999

[28] 10 I.L.M (1971). Hereafter "1970 UNESCO Convention". As at 1 December 1999 there were 91 State parties to the Convention. The United Kingdom is not a party to the Convention.

[29] Most notably Mexico, Argentina, Brazil, Costa Rica, El Salvador, Guinea, India and Peru; Williams, S., *The International and National Protection of Movable Cultural Property. A Comparative Study* (1978) Oceana Publications p.179

[30] Jote, K., *International Legal Protection of Cultural Heritage* (1994) Jurisförlaget pp.116-124

[31] Article 2

The cultural heritage protected by the convention covers a wide range of artefacts, many of which could be recovered from underwater sites, whether wrecks or submerged sites.[32] In order for cultural heritage to be protected, it must not only fall within one of the categories of objects listed in article 1 and be designated as being important by the State, but must also have a link to the particular State wishing to retain the cultural heritage.[33] As the protection of the cultural heritage is linked to the source State's territory, the convention will have no extra-territorial effect, and is unable to protect UCH in international waters. The overall scheme of the Convention is based on cultural nationalism, requiring the source nation to set up procedures and regulations[34] to create a national inventory[35], to promote education and public awareness[36], to protect archaeological sites[37] and to introduce a certification scheme to allow for the legitimate export and transfer of ownership of cultural heritage[38]. Article 7(a) concerns the source State embargo laws, applying to cases where the cultural heritage has been illegally exported. Article 7(b), however, applies to cultural heritage that has been stolen. Market States are not, however, required to impose any sort of import restrictions other than in cases where the cultural heritage has been stolen from a source countries museum or religious or secular monument after the Convention has come into force or where the cultural heritage has been exported illegally and is being considered for purchase by the market State's museum or similar institution.[39] The fact that the Convention only applies to illegal exports after the coming into force of the Convention therefore means that it is not applicable in the many cases for the return of cultural heritage taken during the colonial era. The requesting State is also under an obligation to pay compensation to an innocent purchaser of the cultural property before it will be returned, at the expense of the requesting State.[40] Thus, the convention represents a compromise and balance between importing and exporting States by imposing primary responsibility on exporting States whilst requiring importing States to co-operate with the recovery and restitution of illicitly exported cultural heritage.[41]

The strength of the convention for UCH is that it establishes a system of control over the movement of cultural heritage that could apply to artefacts illicitly recovered from its territory and removed to another State[42]. If will not, however, protect UCH *in situ*, though it may act as a deterrence.

---

[32] Williams *op.cit* p.180; Also Strati *op.cit* p.70

[33] Article 4 states; "The States Parties to this Convention recognise that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: a. Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; b. cultural property found within the national territory; c. cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; d. cultural property which has been the subject of a freely agreed exchange; e. cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property." For a detailed discussion on article 1 and 4 see Gordon, J.B "The UNESCO Convention on the Illicit Movement of Art Treasures" 12 *Harvard International Law Journal* (1971) PP. 542-546

[34] Article 5(a)

[35] Article 5(b)

[36] Article 5(c), (f) & (g)

[37] Article 5(d)

[38] Article 6

[39] Article 7. While cultural heritage stolen from a private party may still returned to that party in some jurisdictions, (e.g. the US, See *Kunstammlungen zu Weimer v. Elicfon* 536 F.Supp. 829 (E.D.N.Y 1981), affirmed 674 F.2d 1150 (2d Cir. 1982)), privately owned cultural heritage which is illegally exported and purchased by a private party in the market State will not be required to be returned by the market State under the terms of the 1970 UNESCO Convention.

[40] Article 7(b)(ii)

[41] Nafziger, J.A.R., "International Penal Aspects of Protecting Cultural Property" 19(3) *International Lawyer* (1985) pp. 835- 852 at p. 837

[42] For example, artefacts recovered from the *Doddington*, which lies in South African territorial waters, and excavated without South African permits, was illicitly removed to the UK, where it was put up for auction. The South African Government are currently involved in litigation to prove that the artefacts were indeed recovered from South African territorial waters are should be returned to South Africa. Neither South Africa nor the UK are parties to the 1970 UNESCO Convention. See Gribble, J., "The Doddington Gold Coins" paper presented at *the Fourth World Archaeological Congress*, University of Cape Town,10th - 14th January 1999

1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage [43]

The World Heritage Convention recognises that certain cultural heritage is of significance to mankind as a whole, irrespective of where it is situated. The preamble states that the "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world" and "that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole". The primary responsibility of protecting these sites of universal importance lies with the state in whose jurisdiction the site lies[44]; though the convention is an attempt to provide international co-operation and assistance as an efficient compliment to State protection. An important duty of each contracting state is the transmission to future generations of the cultural and natural heritage, a significant realisation of the temporal aspect of States intergenerational duties in respect of cultural heritage. According to the Convention, States are required to set up protection, conservation and presentation facilities, integrate the protection of the cultural and natural heritage into comprehensive planning schemes and to develop scientific and technical research measures to counteract the dangers threatening the cultural and natural heritage.[45] While fully respecting the sovereignty of the State in whose territory the cultural or natural heritage of universal significance lies, there is a duty on other State parties to co-operate and assistant that State in protecting the heritage, and in particular, to refrain from any activities which might conflict with the States primary responsibilities.[46] In accordance with this international duty of co-operation and assistance, an Intergovernmental Committee of the Cultural and Natural Heritage of Outstanding Universal Value (the World Heritage Committee) is established[47], whose duty will include the drawing up of a 'World Heritage List' of sites from the lists submitted by each member state[48] as well as a list of sites which require conservation and for which assistance has been requested. Each member state is required to contribute to the 'World Heritage Fund', which will be available for the conservation expenses to the cultural and natural heritage that is threatened by disaster or natural calamities.[49]

There are currently 630[50] sites listed on the world heritage list, situated in over 107 States. The convention applies to immovables, and does not cover individual movable items[51]. The site may, however, be an archaeological site, and arguably, could include a wreck site, particularly one in which the wreck could not possibly be raised.[52] None of the listed sites are underwater sites, though it is feasible for a submerged site to be nominated by a State. As the convention is primarily aimed at State responsibility for the cultural and natural heritage, it has no extra-territorial effect, and no site in international waters can be nominated and inscribed on the World Heritage List. This is unfortunate as there may be sites in international waters which are of outstanding universal importance, and which may be in need of conservation and protection[53]. There obviously exists a need to extend the international co-operation to cover these international sites.

The World Heritage Convention is important for the underwater cultural heritage in international waters, notwithstanding the fact that it does not protect such sites, as it introduces a framework and philosophy appropriate to a convention that will cover such sites. The importance lies in the recognition of the inter temporal nature of protection and the recognition of an international character of certain cultural heritage.

---

[43] 1037 U.N.T.S.151. Hereafter "World Heritage Convention". As at 1 October 2000, there are 161 State parties to the Convention.
[44] Article 4
[45] Article 5
[46] Article 7
[47] Article 8
[48] Article 11
[49] Articles 15-18. For example, the recent earthquakes in Italy which have damaged a number of important cultural sites, such as the Church of St Francis of Assisi
[50] As at 1 October 2000
[51] See Appendix I
[52] This would include an underwater site over which artefacts have been scattered, as was the case in the wreck site of the *Association*. See *Morris v. Lyonesse Salvage Co. (The Association and Romney)* [1970] 2 Lloyd's Rep. 59
[53] The *RMS Titanic*, the *Lusitania*, the *CSS Central America* may be examples.

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects [54]

"Convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and the dissemination of culture for the well-being of humanity and the progress of civilisation, and deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all people, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information"[55],the International Institute for the Unification of Private Law[56] adopted the Convention on Stolen or Illegally Exported Cultural Objects. The impetus for the drafting of this convention came from concerns regarding the implementation of the 1970 UNESCO Convention. In particular the private law aspects of the draft, principally contained in article 7(b)(ii), needed further clarification. Article 7(b)(ii) requires a State Party to take appropriate measures to ensure the recovery and return of cultural property against just compensation to a purchaser in good faith and who has valid title to it.[57]

The convention applies to cases of stolen items of cultural heritage or to items exported contrary to the customs laws of the State. It may be that a given fact situation includes both these infringements. It is therefore evident that the cultural objects are viewed as of primary importance to the State of origin, though it is acknowledged that it may also be of secondary importance to all people of the world[58]. The convention sets out the limitation periods in which a claim for restitution of stolen cultural heritage must be made[59]or make a request for restitution of illegally exported cultural heritage[60]; the right of an innocent purchaser to fair compensation upon the restitution of the cultural objects[61] and the competence of national courts to hear a claim for restitution from a state[62]. The provisions of the Convention only apply in respect of cultural objects stolen[63] or illegally exported[64] after its entry into force. This does not, in any way, legitimise those activities that occurred before the convention entry into force, nor prevent a State from making a claim for restitution under any remedy available outside the framework of this convention.[65] The convention was a major success in compromising between extended periods within which restitution could be claimed and non-retroactively. The source States had wished to maintain as long a limitation time period as possible, and were only able to succeed in obtaining those periods set out in articles 3 and 5 by accepting the 'importing' states demands that the convention was not to apply retrospectively.[66]

The UNIDROIT convention is not directly relevant to the protection *in situ* of UCH in international waters, though it may deter the importation of cultural heritage that may be deemed to

---

[54] Signed on 24 June 1995. Hereafter "UNIDROIT Convention"

[55] Preamble to the Convention

[56] Hereafter "UNIDROIT". UNIDROIT is an independent intergovernmental organisation established in Rome in 1926 under the auspices of the League of Nations. Its primary purpose is to examine ways of harmonising and co-ordinating the private law of States.

[57] Scheider, M., "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects" Research Paper, UNIDROIT, Rome, 28 November 1995 downloaded from http://www.city.ac.uk/artspol /schneider.html p. 2, See also Reichelt, G., "International Protection of Cultural Property" 1 *Uniform Law Review* (1985) p.55

[58] The preamble refers to the cultural heritage 'of all peoples'.

[59] Article 3

[60] Article 5

[61] Article 4, thought this is subject to article 9, and therefore not necessarily mandatory.

[62] Article 8

[63] Article 10(1)

[64] Article 10(2)

[65] Article 10(3)

[66] Early versions of the text included an express non-retroactivity clause. The omission of this clause at a later stage had, however, aroused the suspicions and misinterpretations of dealers, who suggested that the Convention was therefore intended to be retroactive. The omission of the clause had in fact been in response to concerns by the 'exporting' states that the express non-retroactivity clause might be read by their national publics as legitimising prior taking. As many of these countries had lost their most important cultural property by war, punitive raid, or colonialism before 1995, such an interpretation put them in an impossible position. The problem was solved by including Article 10. See Siehr, K., "The UNICROIT Draft Convention on the International Protection of Cultural Objects" 1 *International Journal of Cultural Property* (1992) pp.252-255

have been illegally excavated and exported from a State, and therefore indirectly deter the excavation of UCH sites[67].

B. Recommendations

1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations[68]

Although the recommendation recognises that the cultural heritage found within a State's territory is of primary importance to that State, and that "the regulations of excavations is first and foremost for the domestic jurisdiction of each State", it also recognises that "the history of man implies the knowledge of all different civilisations" and that the international community is "richer for the discoveries" of each State. The recommendation therefore attempts to achieve the universal acceptance and implementation of a standard set of principles by each State. These recommendations will apply to any remains that are in the public interest from the point of view of art, history and architecture. Each State is then free to determine which cultural heritage is of public importance to that State and therefore to be governed by these principles[69]. The recommendations strongly support the retention of the cultural heritage by the State in whose territory it is excavated, and urge these States to preserve archaeological collections in museums.[70] Export of cultural heritage is only envisaged if there are duplicates of particular artefacts and only if they will then be allocated to institutions open to the public[71], or on temporary export to countries that are better able to scientifically analyse the artefacts. [72] The illicit trade in antiquities, clandestine excavations and restitution of cultural heritage illicitly exported are addressed in the recommendations, though they simple urge each state party "to take all necessary measures" to prevent such activities. There is no attempt to set standards in this regard.

The recommendations are particularly important to the UCH in that it is one of the earliest to specifically include UCH within its scope. As the application of the recommendations apply to the territory of each state, it is not applicable to underwater sites in international waters.

The fact that each state determines which cultural heritage is of public importance in that State[73], and therefore capable of being protected by the provisions of the convention, may cause problems when applied to UCH which lie within the States territorial waters, but which has little or no historical connection to that State, except for the fact that it sank in those waters. Some States may view a wreck of a distant nation that sank within its territorial sea as having no public importance to that State, and therefore of no need of protection, while the flag State of the wrecked vessel may regard the site as an important archaeological or historical site.

Among the recommendations are that States impose a blanket protection regime on articles older than a certain age or from a specific period specified by each State[74]; that States establish a competent authority to oversee archaeological excavations and give authority for such excavations[75]; that States ensure that protected objects found are declared[76]; that States impose sanctions for the failure to declare objects found[77] and the confiscation of undeclared objects[78], and

---

[67] See note 42 *supra*
[68] Adopted by the UNESCO General Conference as its 9th Session, New Delhi, 5 December 1956;
[69] Article 2
[70] Article 23(b)
[71] Article 23(c)
[72] Article 23(d)
[73] Article 1 states;
The provisions of the present Recommendation apply to any remains from the point of view of history or art and architecture, each member state being free to adopt the most appropriate criterion for assessing the public interest of objects found in its territory. In particular, the provisions of the present recommendation should apply to any monuments and movable or immovable objects of archaeological interest considered in the widest sense.
[74] Articles 4 & 7-9
[75] Article 5(a)
[76] Article 5(b)
[77] Article 5(c)
[78] Article 5(d)

that the States ownership rights to the archaeological sites are clearly defined.[79] States are also encouraged to establish museums to house central or regional collections[80] and to take appropriate actions to educate the public about the archaeological and historical sites and related activities.[81] The instrument includes strong recommendation for international collaboration in the excavation of archaeological sites, and the establishment of equal opportunities of access to sites between nationals and non-nationals of a State.[82]

These recommendations, some of the earliest in contemporary protection measures, show evidence of an awareness of the importance of perceiving the cultural heritage as important to all mankind, and requiring international co-operation. It is also particularly important in that there is evidence that the member States at the General Conference were aware of the intergenerational duty of each State to preserve the cultural heritage for future generations[83].

1968 UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public and Private Works

Within these recommendation, like to 1956 recommendations, is the accepted principle that the cultural heritage is of primary importance to the state in which it is found; but also that the "cultural property is the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the people of the world." A duty therefore rests on a State to preserve the cultural heritage, not only for the development and evolution of the State's culture, but also for the benefit of all mankind. It is recognised that all States seek social and economic development, and at times these aims may conflict with the preservation of cultural heritage. The recommendations therefore seek to establish a compromise between development and preservation of cultural heritage. The recommendation calls for considering the preservation of an entire site *in situ* from the effects of private or public works if the significance of the cultural heritage warrants it[84]. If not, then salvage or rescue of the cultural heritage from the effects of private or public works is warranted[85]. Each State is urged to enact legislation necessary to ensure the preservation or salvage of cultural property endangered by public or private works[86]; and to establish administrative measures[87], financial measures[88] and preservation and salvage procedures in advance of public or private works, which may include provisions for delaying public or private works[89].

These recommendations may be important to underwater cultural heritage in territorial waters that are being threatened by public works such as dredging, land reclamation schemes and harbour construction.[90]

1972 UNESCO Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage

These recommendations were introduced to extend and strengthen the 1956 and 1968 UNESCO recommendations. The preamble recognises that the State in which an item of cultural heritage is situated "has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations." The duty therefore rests on the host State to protect the

---

[79] Article 5(e)
[80] Article 10-11
[81] Article 12
[82] Articles 13-20;
[83] The use of the term 'heritage' implies an awareness of intergenerational duties. Article 9 also enshrines a duty to preserve the accessibility of archaeological sites for future archaeologist with more advanced archaeological techniques.
[84] Article 4(a)
[85] Article 4(b)
[86] Article 13-14
[87] Article 20-21
[88] Article 15-19
[89] Article 23 & 25
[90] For example, the dredging of the Loire Estuary in France in the 1970's lead to the destruction of the *Juste,* a mid -18th century warship that had been well preserved in the mud prior to its destruction. Archaeologists, such as the Dutch archaeologist Thijs Maarleveld, have accompanied dredgers in Rotterdam and undertaken rescue archaeology when the dredgers have encountered a wreck site. Blott *op.cit* p.112

cultural heritage for all mankind, and not solely for that particular State. This international perspective of the State's duty is reiterated in article 4, which states that "the protection, conservation and presentation of [the cultural heritage] impose responsibilities on the state in whose territory it is situated, both vis-à-vis their own nationals and vis-à-vis the international community as a whole." If an item is not of cultural significance to the host State, it will still be required to protect it if the site is of cultural significance to another State. The recommendations also recognise the host States intertemporal responsibility to future generations as the cultural heritage is "an essential feature of mankind's heritage and a source of enrichment and harmonious development for present and future civilisation."

The definition of the cultural heritage is set in broad terms, and almost identical to the definition in the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.[91] In terms of the recommendations, the State in whose territory the cultural heritage is situated is responsible for its protection and management[92], and this duty will therefore apply to all underwater sites lying within the States territorial sea.[93] The general principle underlying the recommendations is that the cultural and natural heritage situated in a State territory should be viewed as a homogeneous unit, (comprising both works of great intrinsic value and more modest items which have, with the passage of time, acquired cultural or natural value[94]), which can play a part in the nation's social, economic, scientific and cultural life for the present and the future[95] and to this end, should be considered as one of the essential aspects of regional development plans, and planning in general, at the national, regional or local level.[96]

The recommendations urge member States to establish a specialised public service with the main purpose of protecting, conserving and presenting the nations cultural and natural heritage.[97] The protective measures available to the organisation set up in terms of the recommendations can be subdivided into four parts. First, scientific and technical measures are proposed to deal with the physical deterioration of the cultural heritage and to ensure that appropriate research and protection measures are put in place.[98] Secondly, administrative protective measures[99]include the drawing up of national inventories of cultural heritage[100]; the drafting of plans for protection to be incorporated into town and country planning policies[101] and the introduction of a system of prior authorisation before alterations of cultural heritage sites can be undertaken.[102] Thirdly, the legal protective measures[103] recommended include the passing of legislation to protect the cultural heritage and the inclusion of appropriate provisions in planning legislation to ensure that prior authorisation is required before erecting new buildings, demolishing old buildings, or making alterations to existing buildings which may effect the cultural heritage. Included in legal protective measure should be legislation allowing public authorities to act on behalf of an owner when the cultural heritage is threatened, and in appropriate circumstances, to expropriate the cultural heritage subject to domestic legislation.[104] Penalties or administrative sanctions should be imposed for breaches of legal protective measures.[105] Fourthly, the recommendation call for the introduction of financial measures to ensure that funds are available for the appropriate protection and conservation measures.[106]

---

[91] See Appendix I
[92] Article 4
[93] It would appear that the recommendations would not apply to the contiguous zone, as it is not defined as a State's territory.
[94] Article 5
[95] Article 9
[96] Article 8
[97] Articles 12 - 17
[98] Articles 19 - 28
[99] Articles 29 - 39
[100] Article 29
[101] Article 33
[102] Article 35
[103] Articles 40 - 48
[104] Article 44
[105] Article 48
[106] Articles 49 - 59

1976 UNESCO Recommendation Concerning the International Exchange of Cultural Property

The most important outcome of the passing of these recommendations is the recognition of the concept of the 'international communities cultural heritage'. This, according to the preamble of the recommendations, is the sum of the entire national heritage's. The exchange of items of cultural heritage between States is viewed as a way in which each State may learn about and appreciate the distinctive character of the cultures of other nations, all of which makes up the cultural heritage of mankind. Article 2 states that "all cultural heritage forms part of the common cultural heritage of mankind and that every state has a responsibility in this respect, not only towards its own nationals but also towards the international community as a whole". Although the concept of the cultural heritage of all mankind is featured in the recommendations, the acknowledgement that the State in which the cultural heritage is found (which would normally be the State to which the cultural heritage has the closest cultural connection) has a priority over the "international community" is also evident. The preamble states that the "cultural property constitutes a basic element of civilisation and national culture". This is underpinned by the idea that the exchange of cultural heritage is important in that it fosters mutual understanding between nations. Only once the national interests of the host State are adequately addressed, can the cultural heritage be viewed in a broader perspective, in that that particular State's culture is part of the cultural of all mankind.

It is recognised that cultural institutions in a State may have duplicates of a specific item of cultural heritage, which could be exchanged for duplicates which a cultural institution in another State holds. It is also recognised that the international movement of cultural heritage is based to a large extend on the demands of 'self-seeking' parties, usually from western countries, who drive up prices of cultural heritage through speculation, making it difficult for legitimate cultural heritage institutions in poorer countries to compete on the open market. The speculative demand for these items also encourages illicit excavations and trading. At the same time, when cultural heritage institutions in one State wish to obtain items from another State, it is unusual for the proprietary rights to those items to pass from one institution to another, and most agreement to exchange cultural property are based on complex loan agreements or deposits under medium or long-term arrangements. The recommendations therefore attempt to make the exchange of cultural heritage between institutions easier, and through this, to reduce the illicit traffic in these items. It encourages State to adopt legislation effecting inheritance, taxation and customs duties in such a way as to make it easier for cultural heritage to be imported or exported, and for the transfer of ownership of cultural heritage belonging to public or cultural institutions.[107] States are also encouraged to introduce a recording system of offers of exchange of cultural heritage.[108] The offer of exchange should include documentation verifying the offering States ownership of the items, as well as all documentation concerning the conservation requirements and history of the items.[109] The receiving State is, in turn, required to show proof of its ability to conserve the items.[110] The recommendations call for an extensive international information campaign to be launched, possibly controlled by the Council of Museums, aimed at informing cultural institutions as to the most appropriate way in which cultural exchanges can be made.[111] It was hoped that the introduction of such a system would allow better documentation of exchanges of cultural heritage, making it more difficult to transfer ownership of illicit cultural heritage.

These recommendations will not have any effect in protecting the UCH from illicit excavation, but may serve as a means to ensure that any cultural heritage recovered from an underwater site cannot easily be traded.

1978 UNESCO Recommendation for the Protection of Movable Cultural Heritage

The recommendations notes the growing interests in the cultural heritage, and the increase in the dangers to which the cultural heritage is exposed, and proposes a series of protective measures to ensure the physical integrity of the cultural heritage in the possession of both public and private collections. Article 2 states that "each member state should adopt whatever criteria it deems suitable for defining the items of movable cultural property within its territory which should be given the protection envisaged in this Recommendation by reason of their archaeological, historical, artistic, scientific or technical value." The territory will therefore include the territorial

[107] Article 3
[108] Article 4
[109] Article 5 & 6
[110] Article 7
[111] Articles 11 - 13

sea and the recommendations could therefore apply to UCH within this area. The measures are aimed primarily at cultural heritage which, already removed from its archaeological or historical site, may be moved from one place to another, and is therefore of little use to movable cultural heritage found on an underwater site. It may, however, apply to the movement of the cultural heritage from the site after excavation.

1983 United Nations Resolution on the Return or Restitution of Cultural Property to the Countries of origin [112]

Since the adoption of the 1970 UNESCO Convention the General Assembly of the United Nations has adopted a series of biennial Resolutions calling for the return or restitution of cultural heritage to their countries of origin[113]. The resolution recognises "the importance attached by the countries of origin to the return of cultural property which is of fundamental spiritual and cultural value to them, so that they may constitute collections representative of their cultural heritage." The restitution is viewed as a way in which to strengthen the "universal cultural values through fruitful co-operation between developed and developing countries." Once the State of origin of the cultural heritage is able to have all the cultural heritage returned to it, then it may, in accordance with the 1976 UNESCO Recommendation on the Exchange of Cultural Property, enter into any exchange agreement allowing the cultural heritage to be loaned, or even sold, to an institution in another State.

Of particular importance to the underwater cultural heritage, is article 7, which states that the General Assembly "invites Member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures." The rights of a State of origin of a vessel are therefore considered within the question of the return of cultural heritage. The resolution would cover an archaeological or salvage operation on any seabed, including international waters. The resolution is, however, rather vague, as the State of origin, or any other State with has a historical or cultural link to the underwater site, should be taken into account and negotiations over its participation in the operations should be undertaken. The extent of the States participation is, however, undetermined, and left to be decided by negotiation.[114] A State whose vessel has sunk in another States territorial sea, may regard the wreck and its contents as its cultural heritage, and, in accordance with this Resolution, the question of the return of the cultural heritage to the State of origin may arise between the two states.[115]

2. Regional Protection

A. Council of Europe [116]

1954 European Cultural Convention [117]

The importance of the European Cultural Convention lies in the recognition of a 'European Culture' made up of the totality of the different national cultures that make up Europe. The preamble states that one of the aims of the Council of Europe is to safeguard and realise the ideals and principles, which are the common heritage of the member States. To achieve this aim, article 5 provides that

---

[112] A/RES/48/15; 47th Plenary Meeting held on the 2 November 1993

[113] Resolutions 3026 A (XXVII) of 18 December 1972, 3148 (XXVIII) of 14 December 1973, 3187 (XXVIII) of 18 December 1973, 3391 (XXX) of 19 November 1975, 31/40 of 30 November 1976, 32/18 of 11 November 1977, 33/50 of 14 December 1978, 34/64 of 29 November 1979, 35/127 and 35/128 of 11 December 1980, 36/64 of 27 November 1981, 38/34 of 25 November 1983, 40/19 of 21 November 1985, 42/7 of 22 October 1987, 44/18 of 6 November 1989 and 46/10 of 22 October 1991.

[114] Strati *op.cit* p.76

[115] It may be that the UK could rely on this Resolution to call for the return of artefacts from *the HMS Birkenhead*, sunk in South African Territorial Water. This may also apply to the US call for restitution of artefacts raised from the *CSS Alabama* lying in French Territorial waters, or a French call for restitution of artefacts raised from the *La Belle* off the coast of Texas.

[116] For a background discussion on the early activities of the Council of Europe, see Goy, R., "The International Protection of the Cultural and Natural Heritage" 4 *Netherlands yearbook of International Law* (1973) pp. 123-126

[117] 218 U.N.T.S 139; E.T.S. No. 18, signed at Paris, 19 December 1954; Entered into force on 5 May 1955

"each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto." An obligation therefore exists for a States to recognise that cultural heritage in an area under their control is of significance to other States and that nationals of that State should have access to the cultural heritage. Of importance to the UCH is that fact that cultural heritage under the a member State's control shall fall within the protection provided by article 5. This will therefore not only include UCH found within the coastal States territorial sea, but also that those found within its contiguous zone, as, according to article 303(2) of the 1982 Convention on the Law of the Sea, objects of an archaeological or historical nature found on the seabed of the contiguous zone shall be under the control of the coastal State. [118]

1969 European Convention on the Protection of the Archaeological Heritage [119]

This convention seeks to build on and strengthen article 5 of the 1954 European Cultural Convention by providing specific measures to protect the archaeological heritage. The preamble states that "the first step towards protecting this heritage should be to apply the most stringent scientific methods to archaeological research or discoveries, in order to preserve their full historical significance and render impossible the irremediable loss of scientific information that may result from illicit excavation." The measures include the delimitation or zoning of archaeological sites[120]; the prohibition and restraining of illicit excavations, particularly by ensuring that excavations are only undertaken by appropriately qualified persons[121], the establishment of controls to ensure the appropriate conservation of objects from archaeological excavations[122]; the preparation of national inventories of both publicly owned and privately owned archaeological objects;[123] the establishment of measures to endure the rapid and complete dissemination of information in scientific publications of excavations and discoveries[124]; the establishment of a system of control to facilitate the circulation of archaeological objects and associated information amongst members States[125] and the to do all in its power to eradicate the trade in archaeological objects which have been illicitly excavated. Although the convention does not restrict the lawful trade in or ownership of archaeological objects[126], it does require member States to undertake measures to ensure that cultural institutions within its territory do not acquire objects from illicit excavations.[127]

1978 Recommendation 848 on the underwater Heritage

During a debate in the Parliamentary Assembly of the Council of Europe concerning The United National Law of the Sea Convention (UNCLOS III) negotiations, it was noted that due to the political and economic concerns of the negotiators, the question of protection of UCH was likely to receive little attention and therefore be general and superficial.[128] The Council's Committee on Culture and Education examined the issue and prepared a report, which was adopted by the Assembly, and which included Recommendation 848. This recommendation required the Assembly to recommend that the Council of Ministers draw up a draft European convention, and urged member governments to revise their existing legislation to comply with certain minimum recommendations included in the report. These recommendations included;

1. The drawing up of a European Convention and the setting up of a European Group for Underwater Archaeology.

---

[118] Strati *op.cit* p.77
[119] E.T.S No. 66 signed on 6 May 1969; entered into force on 20 November 1970; replaced by the Revised European Convention for the Protection of the Archaeological Heritage of Europe of 16 January 1992
[120] Article 2
[121] Article 3
[122] Article 3
[123] Article 4(2)
[124] Article 4(1)
[125] Article 5
[126] Article 8
[127] Articles 6 & 7
[128] Dromgoole, S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom.* (1993) Unpublished PhD Thesis, University of Southampton p. 4-1

2. The definition of underwater cultural heritage should extend up to what is included in land heritage legislation to ensure that there were no gaps in the protection,
3. Protection should be extended to cover all objects more than 100 years old, with discretion to include more recent objects of historical importance.
4. National jurisdiction should extend to a 200-mile limit
5. Existing salvage and wreck law should not apply to any of these protected sites.
6. A single authority should be given primary responsibility for dealing with land and underwater heritage finds.
7. Provision should be made for appropriate enforcement measures.[129]
8. The administration, in co-operation with UNESCO and ICOM, of the application of the convention[130]
9. A determination of the minimum legal requirements that should be incorporated into national legislation.

These recommendations are a vast improvement on the provisions contained in the UN convention. The recommendations were the first to specifically propose a new regime for the protection of UCH, which was radically different to the existing regime. In particular, it extended jurisdiction to cover 200nm and excluded salvage law, which article 303(3) of UNCLOS had specifically maintained. It also provided for an authority with responsibility of dealing with issues that may arise. This was a particularly welcome recommendation in view of the lack of an authority in article 149 of UNCLOS[131].

1985 European Convention on Offences Relating to Cultural Property [132]

Recognising the existence of a European Cultural Heritage, the convention aims at 'putting to an end the offences that too often affect that heritage.' The convention allows each member State a wide discretion to determine which acts or omissions will be regarded as offences relating to cultural heritage. Certain acts and omissions, such as theft of cultural heritage, or the destruction of cultural heritage belonging to another, are contained in paragraph I of Appendix III to the convention and which all State Parties must regard as offences to cultural property. Paragraph II of Appendix III contains a further list of acts or omissions that a State party to the convention may choice to regard as an offence to cultural heritage. According to article 3(3), a State may further deem any act not specified in the appendix, to be an offence to cultural heritage. A similarly wide choice is given to States in defining the cultural property to be protected by the convention. Paragraph I of Appendix II provides a list of cultural property which all States party to the convention must regard as cultural property to be protected, while paragraph II of Appendix II provides a list of optional cultural property, while also allowing States to determine property not contained in the appendix to also be protected by the provisions of the convention.[133] Included in paragraph I of Appendix II are 'products of archaeological exploration and excavation (including regular and clandestine) conducted on land and underwater'. These are therefore required to be protected by all States party to the convention.

The convention requires States to establish its competence to prosecute any offences relating to cultural property. Article 13 provides that;

"Each Party shall take the necessary measures in order to establish its competence to prosecute any offence relating to cultural property:
a. committed on its territory, including its internal and territorial waters, or in its airspace;
b. committed on board a ship or an aircraft registered in it;
c. committed outside its territory by one of its nationals;
d. committed outside its territory by a person having his/her habitual residence on its territory;
e. committed outside its territory when the cultural property against which that offence was directed belongs to the said party or one of its nationals;
f. committed outside its territory when it was directed against cultural property originally found within its territory."

The territorial scope of the convention specifically includes the territorial sea, therefore extending its protective regime to cover all underwater sites in that area. It also covers all offences committed

[129] Dromgoole *op.cit* p 4-2 to 4-6
[130] Strati *op.cit* p.87
[131] See further chapter 2
[132] E.T.S. No.119
[133] Article 2

on a board a ship registered in a State Party, irrespective of where that ship is, and so may be applied to offences to the cultural heritage committed in international waters on a State registered ship. Similarly, it also covers an offence committed by a State Party's national outside that State's territorial jurisdiction, which would include international waters. This convention is therefore of the utmost importance for the protection of UCH in international waters as is allows for criminal sanctions to be imposed by a State, who may determine which acts or omissions constitutes an offences against the cultural heritage, and what the definition of the cultural heritage is. This is a formidable tool for the protection of UCH in international waters.

Many of the provisions of the convention apply to the restitution of the cultural heritage to the State of origin subsequent to an offence relating to that cultural heritage.[134]

1985 Draft Convention on the Protection of the Underwater Cultural Heritage

Acting on recommendation 848 of the 1978 Parliamentary Assembly, an *ad hoc* Committee of Experts was appointed to draft a European Convention on the Protection of the Underwater Cultural Heritage. This was submitted to the Committee of Ministers in March 1985. The preamble to the draft acknowledged "the importance of the UCH as an integral part of the cultural heritage of mankind and a significant element in the history of the peoples and their mutual relations." It therefore recognised the need for protection, and that the "moral responsibility for protecting the UCH rests with the state directly concerned but that, as this heritage is common to mankind as a whole, such protection is also the concern of all states."

The definition of the UCH is broad enough to cover a wide range of objects. The definition is qualified in that, in order to be protected the UCH must be at least 100 years old.[135] The protective measures provided for in the draft convention include; the requirement that, as far as possible all protective measures should be undertaken to protect the UCH *in situ*[136]; that where authorisation is given to private persons to survey or undertake recovery operations, these persons have the appropriate qualifications and suitable equipment.[137]; the compulsory reporting to competent authorities of UCH finds, and that the finders, as far as possible, leave the UCH undisturbed where it was found;[138] that contracting States ensure that all scientific information concerning the survey, excavation, recovery or conservation of UCH is made available as soon as possible in appropriate publications;[139] that where a State has a particular interest in the UCH situated in another States territory, the interested State is considered by the host State and collaboration undertaken in the surveying, excavation or recovery of the UCH;[140] that States undertake to make available any information concerning the unlawful export of UCH[141] and for its possible restitution to the State from whose territory it was illegally excavated.[142] A contracting State may also require its nationals to report to its competent authority any discoveries of UCH found outside the jurisdiction of any State[143]. This provision would have had an imported effect in the protection of the UCH in international waters, in that, although it may not have had any effect in protecting the site *in situ*, at least it would have required the finders to notify the State of its existence, after which the State may be in a position to protect the site by restricting the importation of objects excavated from the site into its territory, and so provide some measure of protection.

Of particular interest is the acknowledgement that "the underwater cultural heritage is threatened by damaging activities by irresponsible amateur divers, but that at the same time the authorities co-operation with responsible amateur divers and their organisations is essential for the protection of the underwater cultural heritage". Article 10 therefore encourages collaboration with diving institutions and qualified archaeologists in order to promote an appreciation of the UCH and an awareness of the need to protect it.

---

[134] Articles 6 - 11
[135] Article 1
[136] Article 3
[137] Article5
[138] Article 6
[139] Article 7
[140] Article 9
[141] Article 11 & 12
[142] Article 13;
[143] Article 15

The draft contains a rather controversial article, which states that "nothing in this convention effects the rights of identifiable owners, the law of salvage or other rules of international law, or laws and practises with respect to cultural exchanges"[144]. Sites, whether over 100 years old or not, would therefore still be subject to salvage law and operations. Together with the fact the question of ownership of cultural heritage was not considered in the draft, this application of salvage law would still leave sites of archaeological and historical interest in considerable danger.

Unfortunately, when this draft convention was submitted to the Committee of Ministers for approval, Turkey objected to the territorial scope of the convention, and the Committee was unable to adopt the draft. Recommendation 848 was unfortunately an ambitious recommendation, and when it came time to produce a convention, which would ultimately bind member states of the Council of Europe, many of the principles of recommendation 848 were to be sacrificed in order to reach consensus.[145] The territorial scope that caused the controversy was contained in article 2, which states that;

"Outside its territorial sea, within the maritime zone which does not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured, each Contracting State may exercise the control necessary to prevent and punish infringements within its territory or territorial sea of its laws and regulations relating to the protection of the underwater cultural property."

Each contracting State may, in applying paragraph 2 presume that removal of underwater cultural property from the seabed in the zone referred to in that paragraph without its approval would result in an infringement within its territory or territorial sea of its laws and regulation."

This definition is almost identical to that contained in article 303 of the 1982 Law of the Sea Convention. The controversy, which arose between Greece and Turkey, and Turkey's subsequent refusal to endorse the draft over this article, has not been resolved. Until the draft is signed, the final draft and all related documents remain confidential and not available for public dissemination, and so it is difficult to ascertain what will become of this draft. Although this failure to adopt the convention will mean that UCH is not protected, it does provide a basis and a number of important recommendations that States or other regional or international organisations may use to produce protective national legislation.

1992 European Convention on the Protection of the Archaeological Heritage(Revised) [146]

In 1992 the European Convention on the Protection of Archaeological Heritage of 1969 was revised and expanded to bring UCH within it's scope. The Council of Europe specifically noted Recommendation 848 in the preamble to this revised convention, and in order to avoid the jurisdictional problems encountered in the 1985 European draft convention, the 1992 convention stated that the aim of the convention was to protect the archaeological heritage which are located in any area within the jurisdiction of the parties.[147] The 1992 convention defines the territorial scope of the convention when defining the archaeological heritage. Article 1 states;

> "The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.
>
> To this end shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:
> i. the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
> ii .for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
> iii. which are located in any area within the jurisdiction of the Parties.
> The archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water."

---

[144] Article 2
[145] Dromgoole *op.cit* p4-21
[146] E.T.S No. 143, signed at Valetta, 16 January 1992
[147] Article 1(2)(iii) European Convention on the Protection of the Archaeological Heritage (Revised) La Valette, 16.1.1992

The definition is broad enough to cover a wide variety of objects and is particularly important for the UCH as it specifies that the convention covers such objects. The explanatory report to the convention explained this article;

> "the actual area of State jurisdiction depends on the individual States and in respect of this there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural heritage zone" [148]

The jurisdiction of the convention would therefore not be imposed on the individual States, but would cover those areas over which the States had chosen to extend their protective national jurisdiction. For example, Ireland, Spain and Cyprus have extended their national protective legislation over the continental shelf, Morocco over its exclusive economic zone, and France and Denmark, over the contiguous zone. The jurisdictional extent of the convention may therefore be uncertain, and as no convention or agreement has specifically allowed States to extend their protective legislation further than the contiguous zone, it's application will have little effect on the protection of UCH lying out of reach of present States jurisdiction, and certainly not apply to UCH found on the deep sea bed. It at least provides evidence of a desire to comply with the recommended 200 nm jurisdiction in Recommendation 848.

The protective measures build on those specified in the 1969 convention by introducing new practises in archaeology. Of particular importance is the protection of archaeological sites by urging states to implement non-destructive methods of investigation[149] and to preferably undertake investigations and conservation of the archaeological heritage *in situ*. This is particularly important to the UCH where the tendency has been to raise objets from the seabed rather than leave them *in situ*. [150] The introduction of a mandatory reporting system by a finder of a chance discovery to competent authorities[151] is particularly important for underwater sites as these are, by their nature, often difficult to police and monitor illicit excavation.

New measures have been introduced to integrate conservation of the archaeological heritage with development plans. These measures include the participation of archaeologists in the planning of development schemes to ensure that contingencies are included to ensure the protections and conservation of archaeological sites,[152] preferably *in situ* [153]; the allocation of sufficient time to undertake appropriate study of a site[154] and the modifications of development plans likely to have an adverse impact of an archaeological site.[155] These measures may provide some measure of protection for UCH sites that are threatened by dredging schemes, land reclamation schemes or harbour schemes.

B. European Union

1992 Council Regulation on the Export of cultural goods [156]

Article 36 of the European Economic Community Treaty allows member States the rights to define their national treasures and to institute protective measures in this area without frontiers. After the establishment of the internal market in 1992, a system was needed to regulate the circulation of cultural heritage within the Union and to regulate the export or import of cultural heritage with States, which are not members of the European Union. According to article 2, the export of cultural heritage outside the customs territory of the community shall be subject to the presentation of an export licence. Cultural heritage so subject include archaeological objects more than 100 years old which are products of land or underwater excavations.[157]

---

[148]Dromgoole *op.cit* 4-61
[149] Article 3
[150] The concept of conserving the underwater cultural heritage *in situ* has been applied to the wrecks of the *Célèbre* sunk off Lousieberg, Canada in 1758 and the San Juan, in Red Bay, Labrador, sunk in 1565. Blott *op.cit* pp.121-123
[151] Article 2(iii)
[152] Article 5(i)
[153] Article 5(iv)
[154] Article 5(ii)(b)
[155] Article 5(ii)(a)
[156] No.3911/92 of 9 December 1992
[157] Strati *op.cit* pp. 82 - 83

1993 Council Directive on the return of cultural goods removed from the territory of a member state [158]

The 1993 Directive states that cultural objects which are classified by a member State as "national treasures possessing artistic, historic or archaeological value", which includes "archaeological objects more than 100 years old which are the products of land or underwater excavations or finds" that are unlawfully removed from the territory of a member State must be returned to the state of origin. The member State can determine which objects are amongst its national treasures before or after its unlawful removal from the territory under national legislation or under article 36 of the EEC Treaty if that objects can be categorised under one of the categorise listed in the Annex to the Treaty. The State requesting the restitution of the cultural heritage may initiate proceedings in the State from which the cultural heritage is requested, against the possessor of the cultural heritage for its return. Once the requesting State has discovered the whereabouts of cultural heritage unlawfully removed from its territory, or lawfully removed but not returned according to the agreement, and the identity of the possessor, it has one year in which to institute proceedings. Proceedings cannot be brought more than one years after this date, not can it be brought more than 30 years after the cultural heritage has been removed or 75 years after the cultural heritage has been removed if it formed part of the public collection of ecclesiastical institutions. Importantly, the Directive does not have retroactive effect, and applies only to cultural heritage unlawfully removed after 1 January 1993.

C. Organisation of American States

1976 Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations [159]

The Convention recognises that the American Nations have the "basic obligation to transmit to coming generations the legacy of their cultural heritage" and that the continuos plundering and looting of the native cultural heritage of the American States "have damaged and reduced the archaeological, historical and artistic wealth, through which the national character of their people are expressed." The Convention therefore aims to

> "identify, register, protect and safeguard the property making up the cultural heritage of the American nations in order: (a) to prevent illegal exportation or importation of cultural property, and (b) to promote co-operation among the American states for mutual awareness and appreciation of their cultural property."[160]

The cultural property to be protected is defined in article 2 as;

a. Monuments, objects, fragments of ruined buildings, and archaeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna, and flora related to such cultures;
b. Monuments, buildings, objects of an artistic, utilitarian, and ethnological nature, whole or in fragments, from the colonial era and the Nineteenth Century;
c. Libraries and archives; incunabula and manuscripts; books and other publications, iconographies, maps and documents published before 1850;
d. All objects originating after 1850 that the States Parties have recorded as cultural property, provided that they have notice of such registration to the other parties to the treaty;
e. All cultural property that any of the States Parties specifically declares to be included within the scope of this convention.

Article 5 states that the cultural heritage of each States shall consist of the cultural property defined in article 2 (above) which is found or created in its territory and legally acquired items of foreign origin. This will therefore allow all cultural property found within the states territorial sea to be protected under the Convention.

The convention recognises that the ownership of the cultural heritage and its transfer within a state territory is to be governed by national legislation,[161] but that measures need to be introduced to

---

[158] Directive No. 93/7 of 15 March 1993
[159] 15 I.L.M. 1350; Adopted on 16 June 1976
[160] Article 1
[161] Article 7

eradicate the unlawful trade in cultural heritage. The measures include the registration of collection and of transfers of cultural property subject to protection;[162] prohibition of imports of cultural heritage from other States without appropriate certificate and authorisation[163]; the establishment of internal structure to regulate the protection of cultural heritage, including the establishment of inventories, the zoning of archaeological sites, the establishment of technical organs entrusted with protection and safeguarding of cultural heritage[164] and the prevention of unlawful excavations[165]. The convention also contains a number of measures aimed at promoting the restitution of cultural heritage to the State of origin[166], while at the same time, allowing for the exchange of cultural heritage between countries to promote understanding and co-operation between the American Nations.[167]

[162] Article 7(a)
[163] Article 7(c)
[164] Article 8
[165] Article 9 & 10
[166] Articles 11 - 14
[167] Articles 15 & 16

Bibliography

Periodicals

Anon., "War and Neutrality – Rights to a Captured Vessel- 'S.S Admiral Nakhimov'" 29 *The Japanese Annual of International Law* (1986) pp.185-187

Anon., "Comments of the Archaeological Institute of America on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage" 7(2) *International Journal of Cultural property* (1998) pp.538-544

Anon., "Agreement Between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material" 8 *International Journal of Cultural Property* (1999) pp.245-257

Abbass, D.K., "A Marine Archaeologists looks at treasure salvage" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.261-268

Abramson, R.D. and Huttler, S.B., "The Legal Response to Illicit Movement of Cultural Heritage"5 *Law and Policy in International Business* (1973) pp.932-970

Akehurst, M., "Jurisdiction in International Law" 46 *British yearbook of International Law* (1974) pp.145-258

Aldape, A.G., "The International Protection of Cultural Property" *Proceedings of the 71st Annual Meeting of the American Society of International Law* (1977) pp.196-207

Alexander, B., "Treasure Salvage Beyond the Territorial Sea" 20 *Journal of Marine Law and Commerce* (1989) pp.1-19

Alexander, Lewis et. al., "The Cost of Failure at the Third Law of the Sea Conference" 9(1) *Journal of Maritime Law and Commerce* (1977-1978) pp.1-32

Allott, P., "Reconstituting Humanity – new international law" 3 *European Journal of International Law* (1992) pp.219–252

Allot, P., "Mare Nostrum: A New International Law of the Sea" 86 *American Journal of International Law* (1992) pp.764-787

Alpizar, O. J., "Sovereign Rights and Sunken Treasure" 7 *Capital University Law Review* (1977) pp.75-87

Anand, R. P., "UN Convention on the Law of the Sea and the United States" 24(2) *Indian Journal of International Law* (1984) pp.153-199

Anderson, D. H., "Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" 43 *International and Comparative Law Quarterly* (1994) pp.886-893

Anderson, D. H., "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea" 44 *International and Comparative Law Quarterly* (1995) pp..313-326

Anderson, D. H., "British Accession to the UN Convention on the Law of the Sea" 46 *International and Comparative Law Quarterly* (1997) pp.761-786

Antonio, L.K., "The current status of international art law" 10 *Suffolk Transnational Law Journal* (1986) pp.51-86

Arend, A. C., "Archaeological and Historical Objects: Implications of UNCLOS III" 22 *Virginia Journal of International Law* (1982) pp.777-803

Atkinson, K., "Private Enterprise in Maritime Archaeology" II *Bulletin of the Australian Institute of Maritime Archaeology* (1987) p.19

Balinsky, D. A., "Treasure Salvors Inc v Unidentified Wrecked and Abandoned Sailing Vessel 5 *Brooklyn Journal of International Law* (1979) pp.178-190

Barrowman, E., "The Recovery of Shipwrecks in International Waters" 1987 *Michigan Yearbook of International Legal Studies* (1987) pp.231-246

Barto Arnold III, J., "Some Thoughts on Salvage Law and Historic Preservation" 7 *International Journal of Nautical Archaeology* (1978) pp.173-176

Barto Arnold III, J., "Underwater Cultural Resources and the Antiquities Market" 5 *Journal of Field Archaeology* (1978) p.232

Bass, G.F., "Shipwreck and Treasure Hunters" 10 *Journal of Field Archaeology* (1983) p.389

Bass, G. F., "Marine Archaeology: A Misunderstood Science" 2 *Ocean Yearbook* (1980) pp.137-152

Bassiouni, C., "Reflections on Criminal Jurisdiction in International Protection of Cultural Property" 10 *Syracuse Journal of International Law and Commerce* (1983) pp.281-322

Bator, P.M., "An Essay on the International Trade in Art" 34(2) *Stanford Law Review* (1982) pp.275-369

Beall, K. S., "State Regulation of Search for and Salvage of Sunken Treasure" 4 *Natural Resources Lawyer* (1971) pp.1-18

Bederman, D., "The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal" 30(2) Journal *of Maritime Law and Commerce* (1999) pp.331-354

Bederman, D.J., "Admiralty and the Eleventh Amendment" 72 *Notre Dame Law Review* (1997) pp.935-1008

Bederman, D.J., "Uniformity, delegation and the dormant admiralty clause" 28 *Journal of Maritime Law and Commerce* (1997) pp.1-35

Bederman, D.J., "Historic Salvage and the Law of the Sea" 30 *University of Miami Inter-American Law Review* (1998) pp.99-129

Bederman, D.J., "Rethinking the Legal Status of Sunken Warships" 31 *Ocean Development and International Law* (2000) pp.97-125

Bellcross, G., "Problems Associated with the Location and Identification of Early Shipwrecks" 14 *South African Museums Association Bulletin* (1981) pp.326-340

Bellcross, G., "Research Policy on Shipwrecks" 14 *South African Museums Bulletin* (1980) pp.39-44

Berns, P.A., "A Sovereign's Perspective on Treasure Salvage" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.269-277

Bickel, A. M., "The Doctrine of Forum Non Conveniens as Applied in Federal Courts in Matters of Admiralty" 35 *Cornell Law Quarterly* (1949) pp.12-47

Binney, B. F., "Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention" 65 *Washington Law Review* (1990) pp.639-656

Blake, J., "The Protection of Turkey's Underwater Archaeological Heritage – Legislative Measures and Other Approaches" *International journal of Cultural Property* (1994) pp.273-293

Blake, J., "The Protection of the Underwater Cultural Heritage" 45 *International and Comparative Law Quarterly* (1996) pp.819-843

Blanco-Bazán, A., "The IMO guidelines on particular Sensitive Sea Areas (PSSA's). Their possible application to the protection of underwater cultural heritage." 20(4) *Marine Policy* (1996) pp.343-349

Blass, M. S., "Legal Restrictions on American Access to Foreign Cultural Property" 46 *Fordham Law Review* (1978) pp.1177-1204

Bound, M., "Conference on Maritime Archaeology of the Indian Ocean Countries" 19 *International Journal of Nautical Archaeology* (1990) pp.159-161

Bowett, D.W., "Jurisdiction: changing patterns of authority over activities and resources" 53 *British Yearbook of International Law* (1983) pp.1-26

Braekhus, S., "Salvage of 'wrecks and Wreckage Legal Issues Arriving from the Discovery of Coins at Runde in 1972" *Scandinavian Studies in Law* (1976) pp.39-68

Braekhus, S., "Competing Salvors" *Scandinavian Studies in Law* (1967) pp.63-118

Brice. G., "Salvage and the Maritime Environment" 70 *Tulane Law Review* (1995) pp.669-678

Brice, G., "Salvage law and the underwater cultural heritage" 20(4) *Marine Policy* (1996) pp.337-342

Broadwater, J., "Nautical Archaeology: Coming of Age but facing an Identity Crisis" in Watts, G.P (ed), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference on Underwater Archaeology* (1981) Fathom Eight pp.218-224

Brown, E. D., "Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict" 20 *San Diego Law Review* (1983) pp.521-560

Brown, E. D., "Protection of the Underwater Cultural Heritage" 20(4) *Marine Policy* (1996) pp.325-336

Buranich, W.P., "The art collecting countries and their export restrictions on cultural property: Who owns modern art?" 19 *California Western International Law Journal* (1988) pp.153-172

Burnham, E., "International Protection of Cultural Property" 2(1) *Art Research News* (1983) pp.1-2

Burnstein, M.R., "Conflicts on the net: choice of law in transnational cyberspace" 29(1) *Vanderbilt Journal of International law* (1996) pp.75-116

Butler, J. S., "Admiralty - Sovereign Claims" 7 *Georgia Journal of International and Comparative Law* (1977) pp.169-176

Butler, W. E., "Custom, Treaty, State Practise and the 1982 Convention" 12 *Marine Policy* (1988) pp.182-186

Buzan, B., "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea" 75 *American Journal of International Law* (1981) pp.325-348

Caflish, L., "Submarine Antiquities and the International Law of the Sea" 13 *Netherlands Lawbook of International Law* (1982) pp.3-32

Caminos, H and Molitor, M.R., "Progressive Development of International Law and the Package Deal" 79 *American Journal of International Law* (1985) pp.871-890

Cerise, C. A., "Treasure Salvage; the Admiralty Court "Finds" Old Law" 28 *Loyola Law Review* (1982) pp.1126-1145

Cheng, B., "United Nations Resolution on Outer Space: 'Instant' International Customary Law" 5 *Indian Journal of International Law* (1965) pp.23-48

Church, J., "Evaluating the effectiveness of Foreign Laws on National Ownership of Cultural Property in US Courts" 30 *Columbia Journal of Transnational Law* pp.179-229

Ciciriello, M. C., "The Principle of the Common Heritage if Mankind and it's Application in Contemporary International Law: Results of a Research" 2(2) *University of Rome, Dept of Public Law* (1982) pp.609-613

Clagett, B.M., "AGORA: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act" 90 *American Journal of International Law* (1996) pp.419-440

Clément, E., "Current developments at UNESCO concerning the protection of the underwater cultural heritage" 20(4) *Marine Policy* (1996) pp.309-323

Cleere, H., "Government Response to 'Heritage at Sea'" 6(5) *British Archaeological News* (1991) p.15

Cockrell, W. A., "The Trouble with Treasure - a Preservationist View of the Controversy"45 *American Antiquity* (1980) pp.333-339

Cockrell, W.A., " A preservationists overview of the legal and ethical controversy surrounding treasure hunting" in Watts, G.P.(ed.), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference in Underwater Archaeology* (1981) Fathom Eight pp.311-320

Cockrell, W.A., "Why Dr. Bass Couldn't Convince Mr. Grumbel: The Trouble with Treasure Revisited. Again" in Babits, L.E. and Van Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press pp.85-96

Cohen, D. S., "Should Noli Forendi Apply to Sunken Ships" 7 *Boston University Law Review* (1993) pp.193-213

Cohen, J. S., "Governmental Claims for Salvage" II *Transportation Law Journal* (1980) pp.323-342

Collins , M. G., "Salvage of Sunken Military Vessels" 8 *Journal of Maritime Law and Commerce* (1977) pp.433-454

Cottrell, A. M., "The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks" 17 *Fordham International Law Journal* (1994) pp.667-725

Couper, A., "The principle issues in underwater cultural heritage" 20(4) *Marine Policy* (1996) pp.283-285

Crawford. J., "International law and foreign sovereigns: Distinguishing immune transactions" *British Yearbook of International Law* (1983) pp.75-118

Croome, A., "The United States Abandoned Shipwreck Act Goes into Action - a Report" 21(1) *International Journal of Nautical Archaeology* (1992) pp.39-53

Cycon, D., "Who Owns the Titanic" 28(4) *Oceanus* (1985) pp.94-95

Cycon, D. E., "Legal and Regulatory Issues in Marine Archaeology" 28(1) *Oceanus* (1985) pp.78-84

Danilenko, G. M., The Concept of the Common Heritage of Mankind in International Law XIII *Annals of Air and Space Law* (1988) pp.247-265

Davies, T., "Going for Gold" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO pp.258-263

Delanis, J. A., "Jurisdiction - Continental Shelf - Abandoned Vessel Salvaged from the US Continental Shelf" 9 *Vanderbilt Journal of Transnational Law* (1976) pp.914-926

Del Bianco, H.P., "Underwater Recovery Operations in Offshore Waters: Vying for Rights to treasure" 5 *Boston University International Law Journal* (1987) pp.153-176

Delgado, J. P., "Recovering the Past of USS Arizona: Symbolism; Myth and Reality Advances in Underwater Archaeology" 26(4) *Historical Archaeology* (1992) pp.69-79

Dromgoole, S., "Protection of Historic Wreck: The UK Approach Part I: The Present Legal System" 4 *International Journal of Estuarine and Coastal Law* (1989) pp.26-51

Dromgoole, S., "Protection of Historic Wreck: The UK Approach Part II: Towards Reform" 4 *International Journal of Estuarine and Coastal Law* (1989) pp.95-116

Dromgoole, S., "Military Remains On and Around the Coast of the United Kingdom" II (1) *International Journal of Marine and Coastal Law* (1996) pp.23-45

Dromgoole, S., "Legal Protection of the Underwater Cultural Heritage: The United Kingdom Perspective" 4(2) *Art, Antiquity and Law* (1999) pp.135-157

Dromgoole, S., "A note on the meaning of 'wreck'" 28(4) *International Journal of Nautical Archaeology* (1999) pp.319-322

Dromgoole, S. and Gaskell, N., "Interest in Wreck" in Palmer, N. and McKendrik, E. (eds.), *Interest in Goods* (1993) LLP pp.345-400

Dromgoole, S. and Gaskell, N., "Who Has a Right to Historic Wrecks and Wreckage?" 2(2) *International Journal of Cultural Property* (1993) pp.217-273

Dromgoole, S. and Gaskell, N., "Interest in Wreck: Part I" 2(2) *Art, Antiquity and Law* (1997) pp.103-136

Dromgoole, S. and Gaskell, N., "Interest in Wreck: Part II" 2(3) *Art, Antiquity and Law* (1997) pp.207-231

Dromgoole, S and Gaskell, N., "Draft UNESCO Convention on the Protection of the Underwater Cultural heritage 1998" 14(2) *International Journal of Maritime and Coastal Law* (1999) pp.171-206

Duncan Mathewson III, R., "Archaeology on Trial" in Babits, L.E. and Van Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press pp.97-104

Edwards, J. F., "Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects" 22 *University of Toledo Law Review* (1991) pp.919-953

Elia, R. J., "The Ethics of Collaboration: Archaeologists and the Whydah Project" 26(4) *Historical Archaeology* (1992) pp.105-117

Elia, R.J., "US Protection of underwater cultural heritage beyond the territorial sea: problems and prospects" 29 (1) *International Journal of Nautical Archaeology* (2000) pp.43-56

Ervin, S., "Law in Vacuum: The Common Heritage Doctrine in Outer Space Law" 7 *Boston College International and Comparative law Review* (1984) pp.403-431

Eustis III, F. A., "The Glomar Explorer Incident: Implications for the Law of Salvage" 16(1) *Virginia Journal of International Law* (1975) pp.177-185

Fee, F.H., "Abandoned Property: Title to treasure recovered in Florida's territorial waters 21 *University of Florida Law Review* (1969) pp.360-375

Feingold, D. B., "The Abandoned Shipwreck Act of 1987: Navigating Turbulent Constitutional Waters?" 10 *University of Bridgeport Law Review* (1990) pp.361-399

Firth, A., "Recent Legislation in France" 10(4) *International Journal of Nautical Archaeology* (1991) pp.65-69

Firth, A., "Making archaeology: the history of the Protection of Wrecks Act 1973 and the constitution of an archaeological resource" 28(1) *International journal of Nautical Archaeology* (1999) pp.10-24

Fisher, M. A., "The Abandoned Shipwreck Act: The Role of Private Enterprise" 12 *Columbia VLA Journal of Law and the Arts* (1988) pp.393-377.

Fletcher-Tomeius, P and Forrest, C., "Historic wreck in international waters: conflict or consensus?" 24 *Marine Policy* (2000) pp.1-10

Fletcher-Tomenius, P and Forrest, C., "The Protection of the Underwater Cultural Heritage and the Challenge to UNCLOS" 5(5) *Art, Antiquity and Law* (2000) pp.125-158

Fletcher-Tomenius, P., O'Keefe, P.J. and Williams. M., "Salvor in Possession: Friend or Foe to Marine Archaeology" 9(2) *International Journal of Cultural Property* (2000) p.263

Fletcher-Tomenius, P and Williams, M., "The draft UNESCO/DOALOS Convention on the Protection of Underwater Cultural Heritage and conflicts with the European Convention on Human Rights" 28(2) *International Journal of Nautical Archaeology* (1999) pp.145-153

Forrest, C.J.S., "Salvage Law and the Wreck of the Titanic" 1 *Lloyd's Maritime and Commercial Law Quarterly* (2000) pp.1-10

Freestone, D., "Specially Protected Areas and Wildlife in the Caribbean – The 1990 Kingston protocol to the Cartegena Convention" 5(4) *International Journal of Estuarine and Coastal Law* (1990) pp.362-382.

Frey, B.S., "The Evaluation of Cultural Heritage: Some Critical Issues" in Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan pp.31-49

Frigo, M., "The proposed EEC Council Directive on the return of cultural objects unlawfully removed from the territory of a Member State" 2 *International Journal of Cultural Property* (1993) pp.418-422

Fry, J. P., "The Treasure Below: Jurisdiction over salvaging operations in international waters" 88(4) *Columbia Law Review* (1988) pp.863-881

Galdorisi, G., "US and the law of the sea: A window of opportunity for maritime leadership" 26(1) *Ocean development and International Law* (1995) pp.75-83.

Galenskaya, L., "International co-operation in cultural affairs" III *Recueil Des Cours* (1986) pp.265-331.

Galloway, J., "Political Philosophy and the Common Heritage of Mankind Concept in International Law" *Proceedings of the 23rd Colloquium on the law of outer space* (1980) pp.25-28.

Gamble, J. K. and Frankowska, M., "The 1982 Convention and Customary Law of the Sea: Observation, a framework and a warning" 21 *San Diego Law Review* (1984) pp.491-511

Gaskell. N.J., "The International Salvage Convention 1989" 4 *International Journal of Estuarine and Coastal Law* (1989) pp.268-287

Gaskell, N., "The 1989 Salvage Convention and the Lloyds' open forum Salvage agreements" 16 *Tulane Maritime Law Journal* (1990) pp.1-103

Gerber, D.J., "The Extraterritorial application of the German Antitrust Laws" 77 *American Journal of International Law* (1983) pp.756-783

Gibson, J., "Protection of Military Remains Act 1986" 2(3) *International Journal of Estuarine and Coastal Law* (1987) pp.182-186

Gibson, J., "The Lusitania and ownership of wreck" 1 *International Journal of Estuarine and Coastal Law* (1986) pp.323-324

Giesecke, A. G., "New Legislation Introduced to Protect Historic Shipwrecks" 10 *Journal of Field Archaeology* (1983) pp.488-490.

Giesecke, A. G., "Management of Historic Shipwrecks in the 1980's" 12 *Journal of Field Archaeology* (1985) pp.108-112

Giesecke, A.G., "Shipwrecks: Past in the Present" 15 *Coastal Management* (1987) pp.179-196

Giesecke, A.G., "The Abandoned Shipwreck Act Through the Eyes of its Drafter" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.167-173

Gifford, J. Redknapp, M. and Fleming, N., "UNESCO International Survey of Underwater Cultural Heritage" 16 *World Archaeology* (1985) pp.373-376.

Goddard, K. S., "Is there a right to wreck?" *Lloyds' Maritime and Commercial Law Quarterly* (1983) pp.625-630.

Goldie, L. F. E., "A note on some diverse meanings of 'The common heritage of mankind'" 10 *Syracuse Journal of International Law and Commerce* (1983) pp.69-112.

Gonzalez, M. A., "New legal tools to curb illicit traffic in pre-Columbian antiquities" 12 *Columbia Journal Transnational Law* (1973) pp.316-341

Gordon, J. B., "The UNESCO Convention on the Illicit Movement of Art Treasures" 12 *Harvard International Law Journal* (1971) pp.537-556.

Gorove, S., "The concept of the common heritage of mankind" 9 *San Diego Law Review* (1970) pp.390-403.

Goy, R. H. M., "The International Protection of the Cultural and Natural Heritage" 4 *Netherlands Yearbook of International Law* (1973) pp.117-141.

Grime, R.P., "Insurance and the effect of abandonment" in *Problems of the Shatt-Al-Arab*: Papers of a one-day seminar conducted by the Institute of Maritime Law, University of Southampton, 9th September 1983 pp.30-39

Guerzoni, G., "Cultural Heritage and Preservation Policies: Notes on the History of the Italian case" in Hutter, M. and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.107-132

Hammond, G., "Treasure Trove: Ancient Law to Preserve Archaeological Relics" 56 *Antiquity* (1982) pp.58-60

Hardy, M., "Decision making at the Law of the Sea Conference" 11 *Revue Belge De Droit International* (1975) pp.442-474.

Hatcher, M and Thorncroft, A., "The Nanking Cargo" in Prott, L.V., and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO pp.84-93

Haunton, M., "Archaeological Heritage Preservation Act 1990" 2 *International Journal of Cultural Property* (1992) pp.395-402.

Hayashi, M., "Archaeological and historical objects under the United Nations Convention on the Law of the Sea" 20(4) *Marine Policy* (1996) pp.291-296

Head, J.W., "Supranational Law: How the Move Towards Multilateral Solutions Is Changing the Character of 'International' Law" 42(3) *University of Kansas law Review* (1994) pp.605-666

Herscher, E., "Remove the Double Standard/ Historic Shipwreck Legislation" 10 *Journal of Field Archaeology* (1983) pp.105-115.

Herscher, E., "Hearings held on Historic Shipwreck Legislation" 11 *Journal of Field Archaeology* (1983) pp.79-96.

Herscher, E., "Florida agreement with Treasure Salvors Inc." 11 *Journal of Field Archaeology* (1984) pp.225-227.

Herscher, E., "International Control Efforts: Are There Any Good Solutions?" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press, Albuquerque p.117

Hess, P.E., "The Trouble with Treasure: Ethical Dilemmas for the Salvage Attorney" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.253-259

Higgins, R., "Allocating Competence: Jurisdiction" in *General Course on Public International Law* (1993) pp.89–114

Horan, E.W., "Organising, Manning and Financing a Treasure Salvage Expedition" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.235-243

Hoyle, B. J., "US Position on Titanic memorial site" 28(4) *Oceanus* (1985) pp.45-46

Hutchinson, G., "Threats to underwater cultural heritage. The problem of unprotected archaeological and historical sites, wrecks and objects found at sea" 20(4) *Marine Policy* (1996) pp.287-290

Hudson, A.H., "Abandonment" in Palmer, N. and McKendrik, E. (eds.), *Interest in Goods* (1993) LLP pp.423-447

Janis, M.W., "International Law?" 32 *Harvard Journal of International Law* (1991) pp.363–372

Jenkins, P., "The UNIDROIT Convention on stolen or illegally exported cultural objects" 1(2) *Art, Antiquity and Law* (1996) pp.163-170

Jenssen, V., "Continuing involvement of Governments: the problem of conservation" in Langley, S.B., and Unger, R.W., *Nautical Archaeology: Progress and Public Responsibility* (1984) BAR International Series p.48

Johnson, D.R and Post, D., "Law and borders – the use of law in cyberspace" 48 *Stanford Law Review* (1996) pp.1367–1402

Johnson, S., "Evolving Perceptions: Legal Aspects of the Protection of the Environment in Areas Not Subject to National Jurisdiction (Global Commons)" in Al-Nauimi, N. and Meese, R. (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (1995) Kluwer law International pp.171-201

Johnston, P.F., "Is it treasure or a worthless piece of a ship?"26(4) *Historical Archaeology* (1992) pp.118-123

Johnston, P.F., "Treasure salvage, archaeological ethics and maritime museums" 22(1) *International Journal of Nautical Archaeology* (1993) pp.53-60

Jone, S. J. E., "Admiralty - possessory rights in abandoned vessels" 19 *Virginia Journal of International Law* (1979) pp.473-482.

Jones, J.P., "The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.205-227

Joyner, C. C., "Legal Implications of the concept of the common heritage of mankind" 35 *International and Comparative Law Quarterly* (1986) pp.190-199

Jore, K.S., "Illicit movement of art and artefacts" 13 *Brooklyn journal of International Law* (1987) pp.55–81

Kamenka, E., "Human Rights and peoples rights in Crawford, J., (ed.) *The Rights of Peoples* (1988) Clarendon Press, Oxford pp.127-140

Kaoru, Y. and Hoagland, P., "The Value of Historic Shipwrecks: Conflicts and Management" 22 *Coastal Management* (1994) pp.195-213.

Keith, D.H., "Going, Going – Gone!" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO pp.265-278

Keller, P.N., "Salvor-Sovereign Relations: How the State of Illinois Destroyed the Lady Elgin" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.245-251

Kenny, J. and Hrusoff, R., "The Ownership of the Treasures of the Sea" 9 *William and Mary Law Review* (1967) pp.383-401

Khan, A., "The extinction of nation-states" 7(2) *American Journal of Law and Policy* (1992) pp.197-234

King, J.L., "Cultural Property and National Sovereignty" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.199-208

King, M., "Admiralty law: Evolving legal treatment of property claims to shipwrecks in international waters" 31 *Harvard International Law Journal* (1990) pp. 313-321

Kiss, A.C., "Conserving the common heritage of mankind" 59(4) *Revista Juridica University Puerto Rico* (1990) pp.773-777

Klamer, A., "The Value of Cultural Heritage" in Hutter, M. and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.74-87

Koboldt, C., "Optimising the Use of Cultural Heritage" in Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.50-68

Koenig, R. A., "Rights in recovered sea treasure. The salvors perspective" 3 *New York Journal of International Law and Commerce* (1982) pp.271-305

Kothals-Altes, A., "Submarine antiquities: A legal labyrinth" 4 *Syracuse Journal of International Law and Commerce* (1976) pp.77-96

Korthals-Altes, A., "Sunken Spanish 'treasure in Anglo-American Law" XI *Derecho Commercial Comparado Trabajos En Homenaje A Ferran Valls I Taberner* (1989) pp.3125-3150

Kwiatkowska, B., "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the sea Convention and State Practise" 22 *Ocean Development and International Law* (1991) pp.153-187.

Landes, W. M. and Posner, R. A., "Salvors, Finders, Good Samaritans and other Rescuers: An economic study of law and altruism" 7 *Journal of Legal Studies* (1978) pp.83-128.

Lanier, R., "Abandon ship? The utility of Abandonment" 9 *Journal of Maritime Law and Commerce* (1977-1978) pp.131-136.

Larschan, B. and Brennan, B. C., "The Common Heritage of Mankind Principle in International Law" 21 *Colombian Journal of Transnational Law* (1983) pp.305-337

Larson, D. L., "Conventional customary and consensual law in the United Nations Convention on the Law of the Sea" 25 *Ocean Development and International Law* (1994) pp.75-85.

Lawrence, A., "State Antiquity Laws and Admiralty Salvage Protecting Our Cultural Heritage" 32 *Miami Law Review* (1977) pp.291-338

Lawson, E., "In between: The care of artefacts from the seabed to the conservation laboratory and some reasons why it is necessary" in Barto Arnold III.J (ed.) *Beneath the Waters of Time. Proceedings of the 9th conference on underwater archaeology* (1978) pp.69-91.

Lefeber, R., "The exercise of jurisdiction in the Antarctic region and the changing structure of international law" XXI *Netherlands Yearbook of International Law* (1990) pp.81-137

Lillington, S. D., "Wreck or Wreccum Maris? 'The Lusitania'" *Lloyd's maritime and Commercial Law Quarterly* (1987) pp.267-272

Lindbloom, S. J., "Historic Shipwreck Legislation: Raising the Titanic from the Law of the Sea" 13 *Journal of Legislation* (1986) pp.92-111.

Lipka, L. J., "Abandoned Property at Sea: Who owns the salvage finds?" 12 *William and Mary Law Review* (1970) pp.97-110.

Lohrey, T. E., "Sunken Vessels, their cargoes and the casual salvor" 20 *JAG Journal* (1965) pp.25-37.

Lowe, A.V., "Blocking extraterritorial jurisdiction: The British Protection of Trading Interests Act, 1980 " 75 *American Journal of International Law* (1981) pp.257-282

Lowe, A.V., "Do general rules of international law exist?" 9 *Review of International Studies* (1983) pp.207-213

Lowenfeld, A., "Sovereignty, Jurisdiction and reasonableness: A Reply to A.V.Lowe" 75 *American Journal of International Law* (1981) pp.629-638

Lowenfeld, A.F., "US law enforcement abroad: The constitution and international law" 83 *American Journal of International Law* (1989) pp.880–893

Lowenfeld, A.F., "Agora: The Cuban Liberty and Democratic Solidarity (LIBERSTAD) Act" 90 *American Journal of International Law* (1996) pp.419–434

McDonald, B., "Admiralty Law - The United States has not asserted Sovereign prerogative over abandoned property on Outer Continental Shelf" 4 *University of Florida Law Review* (1976) pp.561-568

McLaughlin, S.L., "Roots, Relics and Recovery: What went wrong with the Abandoned Shipwreck Act of 1987" 19 *Columbia-VLA Journal of Law and the Arts* (1995) pp.149-198

McWilliams, D., "Salvage of Ancient Treasure Ships" *Lloyd's Maritime and Commercial Law Quarterly* (1986) pp.16-21

Maarlveld, T.J., "Archaeological heritage management in Dutch waters: exploratory studies – cultural and legislative perspectives" in Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO p.203-217

Macrae, L., "Customary International Law and the United Nations Law of the Sea Treaty" 13 *California Western International Law Journal* (1983) pp.181-222

Mahn, C.A., "International Law State Succession: United States Holds Title From A Sunken Confederate Vessel" 17(1) *Suffolk Transnational Law Review* (1994) pp.266-277

Mann, F.A., " The Doctrine of International Jurisdiction revisisted after twenty Years" 186 *Recueil de Cours* (1984) pp.9-116

Marsden, R. G., "Admiralty Droits and Salvage" 15 *Law Quarterly Review* (1899) pp.353-366

Marston, G., "The Evolution of the Concept of Sovereignty Over the bed and subsoil of the Territorial sea" XLVIII *British Yearbook of International Law* (1976-1977) pp.321-332

Martin, C., "Archaeology in an Underwater Environment" in Anon., *Protection of the Underwater Cultural heritage: Technical Handbook for Museums and Monuments* (1981) UNESCO Publishing p.19

Marx, R., "The Disappearing Underwater Heritage" 35 *Museum* (1983) pp.9-10

Meenan, J. K., "Cultural resource presentation and underwater archaeology. Some notes on the current legal framework and a model underwater antiquities statute." 15 *San Diego Law Review* (1978) pp.623-662

Melikan, R., "Shippers, Salvors and Sovereigns: Competing Interests in the Medieval Law of Shipwreck" 11(2) *Journal of Legal History* (1990) pp.163-181

Merryman, J.H., "International Art Law: From cultural nationalism to a common cultural heritage" 15(4) *Journal of International Law and Politics* (1983) pp.757-763

Merryman, J.H., "Two ways of thinking about cultural property" 80 *American Journal of International Law* (1986) pp.831-853

Merryman, J. H., "The retention of cultural property" 21 *University of California Davis Law Review* (1988) pp.477-513

Merryman, J.H., "The Public Interest in Cultural Property" 77 *California Law Review* (1989) pp.339-364

Merryman. J. H., "Protection of the Cultural Heritage" 38 *American Journal of Comparative Law* (1990) pp.513-522

Merryman, J.H., "A licit international trade in Cultural Objects" 4(1) *International Journal of Cultural Property* (1995) pp.13–60

Migliorino, L., "Submarine Antiquities and the Law of the Sea" 4(4) *Marine Policy Reports* (1982) pp.1-5

Migliorino, L., "The Recovery of Sunken Warships in International Waters" in Vukas, B. (ed.), *Essays on the New Law of the Sea* (1985) pp.244-258

Migliorino, L., "In Situ Protection of the Underwater Cultural Heritage Under International Treaties and National Legislation" 19(4) *International Journal of Marine and Coastal Law* (1995) pp.483-495

Miller, G. L., "The second destruction of the Geldermelson" in Barto Arnold III, J. (ed.), 26(4) *Advances in Underwater Archaeology* (1992) pp.124-131

Miller. G.L., "The Second Destruction of the *Geldermalsen*" in Prott, L.V. and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO pp.94-101

Monden, A. and Wils, G., "Art Objects as common heritage of mankind" XIX *Revue Belge De Droit International* (1986) pp.327-338

Mossetto, G,M "Privatization Policies in Venice" in Hutter, M. and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.185-195

Moustakas, J., "Group rights in cultural property: Justifying strict inalienability" 74 *Cornell Law Review* (1989) pp.1179-1227

Mulvaney, J., "A Question of Values: Museums and Cultural Property" in McBryde, I. (ed.), *Who Owns the Past?* (1985) Oxford University Press p.86

Murphy, E.E., "Diminishing World of Western law" 16 *Texas International Law Journal* (1981) pp.1-10

Nafziger, J.A.R., "UNESCO centred management of international conflict over cultural property" 27(5) *The Hastings Law Journal* (1976) pp.1051-1067

Nafziger, J.A.R., "The new international legal framework for the return, restitution or forfeiture of cultural property" 15 *New York University Journal of International Law and Politics* (1983) pp.789-812

Nafziger, J.A.R., "Comments on the relevance of law and culture to cultural property law" 10 *Syracuse Journal of International Law and Commerce* (1983) pp.323-332

Nafziger, J.A.R., "International Penal Aspects of Protecting Cultural Property" 16(3) *The International Lawyer* (1985) pp.835-852

Nafziger, J.A.R., "Finding the Titanic: Beginning an International Salvage of Derelict Law of the Sea" 12 *Columbia-VLA Journal of Law and the Arts* (1988) pp.339-351

Nafziger, J.A.R., "The Titanic Revisited" 30 (2) *Journal of Maritime Law and Commerce* (1999) p.311-329

Nafziger, J.A.R., "Cultural Property Law Enters Murky Waters" *Translex* (October 1999) pp.13-16

Nafziger, J.A.R., "Historic Salvage Law Revisited" 31 *Ocean Development and International Law* (2000) pp.81-96

Nandan, S. N. and Anderson, D. H., "Straits used for International Navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982" LX *British Yearbook of International Law* (1989) pp.159-204

Nash, M. L., "The Law of Treasure and Treasure Hunters" *New Law Journal* Nov. 30. (1978) p.1163

Nash, M.L., "The Lusitania and it's consequences" *New Law Journal* April 4.(1986) pp.317-319

Newton, C. F., "Finders Keepers? The Titanic and the 1982 Law of the Sea Convention" 10 *Hastings International and Comparative Law Review* (1986) pp.159-197

O'Keefe, P.J., "Maritime archaeology and salvage news: Some comments following Robinson v. The Westerns Australian Museum" 7(1) *International Journal of Nautical Archaeology and Underwater Exploration* (1978) pp.3-7

O'Keefe, P.J., "Current developments Regarding Regulation of Marine Archaeology Outside territorial Waters" in Watts, G.P (ed), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference on Underwater Archaeology* (1981) Fathom Eight pp.338-347

O'Keefe, P.J., "Export and Import controls on movement of the cultural heritage: Problems at the national level" 10 *Syracuse Journal of International Law and Commerce* (1983) pp.354-370

O'Keefe, P.J., "The Law and Nautical Archaeology: An International Survey", in Langley, S. and Unger, G., *Nautical Archaeology: Progress and Public Responsibility* (1984) BAR Series pp.9–10

O'Keefe, P.J., "Export/Import Laws – Problems of drafting and Implementation" in Lalive, P. (ed.), *International Sales of Works of Art* (1990) Kluwer Law and Taxation Publishers pp.57-87

O'Keefe, P. J., "Gold, Abandonment and Salvage" *Lloyd's Maritime and Commercial Law Quarterly* (1994) pp.7-12

O'Keefe, P. J., "Protection of the material cultural heritage: The commonwealth scheme" 44 *International and Comparative Law Quarterly* (1995) pp.147-161

O'Keefe, P.J., "Protection of the Underwater Cultural Heritage: Developments at UNESCO" 25(3) *International Journal of Nautical Archaeology* (1996) pp.169-176

O'Keefe, P.J., Activities of International Organisations in the Protection of cultural Heritage" 1(1) *Uniform Law Review* (1996) pp.88-95

O'Keefe, P.J., "Protecting the underwater cultural heritage. The International Law Association Draft Convention" 20(4) *Marine Policy* (1996) pp.297-307

O'Keefe, P.J., "The use of data basses to combat theft of cultural heritage material" 2(4) *Art, Antiquity and Law* (1997) pp.357–366

O'Keefe, P.J., "Incidental Collections: Protection Against Dispersal" 3(2) *Art, Antiquity and Law* (1998) pp.165-177

O'Keefe, P.J., "Second meeting of Governmental Experts to Consider the Draft Convention on the Protection of the Underwater Cultural Heritage" 8(2) *International Journal of Cultural Property* (1999) pp.568–574

O'Keefe, P. & Nafziger, J. A. R., "The Draft Convention on the Protection of Underwater Cultural Heritage" 25(4) *Ocean Development and International Law* (1994) pp.391-418

Owen, D. R., "Some legal troubles with Treasure: Jurisdiction and Salvage" 16(2) *Journal of Maritime Law and Commerce* (1985) pp.139-179

Owen, D.R, "The Abandoned Shipwreck Act of 1987. Goodbye to Salvage in the Territorial Sea" 19 *Journal of Maritime Law and Commerce* (1988) pp.499-516

Oxman, B. H., "The Third United Nations Conference on the Law of the Sea: The Ninth Session" 75 *American Journal of International Law* (1981) pp.211-256

Oxman, B. H., "Marine Archaeology and the International Law of the Sea" 12(3) *Columbia VLA Journal of Law and the Arts* (1988) pp.353-372

Paull IV, J., "Salvage Sunken Shipwrecks; Whose treasure is it? A look at the competing interests for Florida's Underwater Riches" 9(2) *Journal of Land Use and Environment* (1994) pp.347-373

Palmer, N. E., "Treasure Trove and the Protection of Antiquities" 44 *Modern Law Review* (1981) pp.178-187

Palmer, N., "Treasure Trove and Title to Discarded Antiquities" 2(2) *International Journal of Cultural Property* (1993) pp.275-319

Pendelton, E and Cox, R., "Trouble Down Below" in Cunningham, R.B., *Archaeology, Relics, and the Law* (1999) Carolina Academic Press pp.10-14

Pinto, C.W., "'Common heritage of Mankind': From Metaphor to Myth, and the Consequence of Constructive Ambiguity" in Makarcyk, J. (ed.), *Theory of International law at the Threshold of the 21st Century: Essays in Honour of Krzyztof Skubiszewski* (1996) Kluwer Law International pp.249-268

Plant, G., "The Third United Nations Conference on the Law of the Sea and the preparatory commission: Models for United Nations Law-Making?" 36 *International and Comparative Law Quarterly* (1987) pp.525-558

Polonsky, M. and Canat, J-F., "The British and French System of Control of the Export of Works of Art" 45 *International and Comparative Law Quarterly* (1996) pp.556-591

Prisbe, J. T., "Law Determining Ownership of Shipwreck in the US" *Lloyd's Maritime and Commercial Law Quarterly* (1987) pp.24-28

Prott, L. V., "International control of illicit movement of the cultural heritage: The 1970 UNESCO convention and some possible alternatives" 10 *Syracuse Journal of International Law and Commerce* (1985) pp.333-351

Prott, L.V., "Commentary: The 1954 Hague Convention for the protection of cultural property in the event of armed conflict " in Ronzitti, R., (ed.) *The Law of Naval Warfare* (1988) Martinus Nijhoff Publishers pp.582-583

Prott, L.V., "Cultural Rights as People's Rights in International Law" in Crawford, J.(ed.), *The Rights of Peoples* (1988) Oxford University Press pp.93-106

Prott, L.V., "Problems of private International Law for the Protection of the Cultural Heritage" V *Recueil des Cours* (1989) pp.219-318

Prott, L. V., "Strengthening the Law" 43 *UNESCO Sources* (1992) p.11

Prott, L. V., "The preliminary draft UNIDROIT Convention on Stolen and Illegally exported Cultural objects" 4 *International and Comparative Law Quarterly* (1992) pp.160-170

Prott, L.V., "Safeguarding the underwater cultural heritage" 49(1) *Museum International* (1997) p.39

Prott, L.V., "Underwater Cultural Heritage: The Secrets of the Sea" 2(5) *World Heritage Review* (1997) pp.32-33

Prott, L.V and O'Keefe, P.J., "Law and the Underwater Heritage" in *Protection of the Underwater Heritage: Technical Handbook for Museums and Monuments*. UNESCO (1981) pp.167-200

Prott, L. and O'Keefe, P. J., "Cultural Heritage or Cultural Property" 1 *International Journal of Cultural Property* (1992) pp.307-320

Reichelt, G., "International protection of cultural property" I *Uniform Law Review Biannual* (1985) pp.43-153

Reidenberg, J.R., "Governing networks and rule-making in cyberspace" 45 *Emory Law Journal* (1996) pp.911-930

Riphagen, W., "Some reflections on functional sovereignty" 6 *Netherlands Yearbook of International Law* (1975) pp.121-165

Roach, J.A, "France Concedes United States Has Title to CSS Alabama" 85(2) *American Journal of Law* (1991) pp.381-383

Roach, J.A., "Sunken warships and military aircraft" 20(4) *Marine Policy* (1996) pp.351-356

Robol, R.T., "Legal Protection for Underwater Cultural Resources: Can We Do Better?" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.303-309

Roberts, K. E., "Sinking, Salvage and Abandonment" 51 *Tulane Law Review* (1977) pp.1197-1214

Rubin, A., "Sunken Soviet Submarines and Central Intelligence: Laws of Property and the Agency" 69 *American Journal of International Law* (1975) pp.855-858

Ruffman, A., Gault, I. T. and Vanderzwaag, D., "Legal Jurisdiction over the Titanic" 37 *Lighthouse* (1988) pp.23-39

Sassoon, D., "Considering the Perspective of the Victim: The Antiquities of Nepal" in " in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.61-92

Shallcross, D.B. and Giesecke, A., "Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks" 10(2) *Syracuse Journal of International Law and Commerce* (1983) pp.371-404

Sharpreau, C. J., "Treasure Salvors win a Victory in the Ninth Circuit" 2 *Art, Antiquity and Law* (1997) pp.51-54

Shapreau, C.J., "The Brother Jonathan decision: Treasure salvor's 'Actual Possession' of Shipwreck Gives rise to federal jurisdiction for Title Claim" 7 *International Journal of Cultural Property* (1998) pp.475-495

Shaw. R., "The 1989 Salvage Convention and English Law" 2 *Lloyd's Maritime and Commercial Law Quarterly* (1996) pp.202-231

Shestack, A., "The Museum and Cultural Property: The Transformation of Institutional Ethics" in Messenger. P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.93-101

Shibata, A., "International Law Making Process in the United Nations" 24(1) *California Western International Law Journal* (1993) pp.17-53

Shore, H., "Marine archaeology and international law: Background and some suggestions" 9 *San Diego Law Review* (1972) pp.668-700

Shuzong, H., "What Kind of Underwater Heritage Convention Do We Need?" 8(2) *International Journal of Cultural Property* (1999) pp.575-577

Siehr, K., "The UNIDROIT draft Convention on the International Protection of Cultural Objects" 1 *International Journal of Cultural Property* (1992) pp.252-255

Smith, W.C., Grebmeier, J., Green, R.L., and Duskin, D., "Puget Sound: A Progress Report from the Centre for Marine Archaeology" in Watts, G.P. (ed.), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference on Underwater Archaeology* (1981) Fathom Eight pp.348-367

Stevens, T.T., "The Abandoned Shipwreck Act of 1987. Finding the Proper Ballast" 37(3) *Villanova Law Review* (1992) pp.573-617

Stahl, R., "Retention and retrieval of art and antiquities through international and national means: the tug of war over cultural property" 5 *Brooklyn Journal of International Law* (1979) pp.103-128

Strati, A., "Deep Seabed Cultural Property and the Common Heritage of Mankind" 40 *International and Comparative Law Quarterly* (1990) pp.859-894

Sweeney, J.C., "An Overview of Commercial salvage Principles in the Context of Marine Archaeology" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.185-203

Thomason, D.N., "Rolling back history: The United Nations General Assembly and the Right to Cultural Property" 22 *Case Western Reserve Journal of International Law* (1990) pp.47-96

Throsby, D., "Seven Questions in the Economics of Cultural Heritage" in Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press pp.13-30

Throckmorton, P., "The Worlds Worst Investment: The Economics of Treasure Hunting with real-Life Comparisons" in Babits, L.E. and Van Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press pp.75-83

Treves, T., "Military Installations, Structures and Devices on the Seabed" 74 *American Journal of International Law* (1980) pp.808-857

Treves, T., "Devices to facilitate consensus: The experience of the Law of the Sea Conference" 2 *Italian Yearbook of International Law* (1976) pp.39-60

Trigger, B., "The Past as Power: Anthropology and the North American Indian" in McBryde, I. (ed), *Who Owns the Past?* (1985) Oxford University Press pp.11-40

Valentin, P., "The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects" 4(2) *Art, Antiquity and Law* (1999) pp.107-117

Van Dyk, J. and Yean, C., "Common Heritage v Freedom of the High seas: Which governs the Seabed?" 12 *San Diego Law Review* (1982) pp.493-551

Van Gaalen, M and Verheij, A., "The consequences for the Netherlands of the UNIDROIT Convention" 3(1) *Art, Antiquity and Law* (1998) pp.3-14

Varmer. O., "The Case Against the 'Salvage' of the Cultural Heritage" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.279-302

Verlaan, P.A., "Marine Archaeology: A Trojan (Sea) Horse?" 8 *Ocean Yearbook* (1989) pp.231-253

Vignes, D., "Will the Third Conference on the Law of the Sea work according to the consensus rule?" 69 *American Journal of International Law* (1975) pp.119-129

Von Mehren. A., "Adjudicatory jurisdiction: general theories compared and evaluated" 63 *Boston University law Review* (1983) pp.279–340

Vrana, K. and Haksey, J. R., "Shipwreck Location and Management in Michigan" 26(4) *Historical and Archaeological* (1993) pp.81-96

Walters, D. R., "Terms and Concepts related to Marine Archaeology" 1 *Oceanus* (1985) pp.13-17

Warren. K.J., "A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues" in Messenger. P.M., (ed.) *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press pp.1-25

Watters, D. R., "The Law of the Sea and Underwater Cultural Resources" 48 *American Antiquity* (1983) pp.808-816

Watters, D.R., "Terms and Concepts Related to Marine Archaeology" 1 *Oceanus* (1985) pp.13-17

Weiss, E.B.," The Planetary trust: Conservation and Intergenerational Equity" 11(4) *Ecology Law Quarterly* (1984) pp.495-581

Werz, B., "A Preliminary Step to Protect South Africa's Undersea Heritage" 19(4) *International Journal of Nautical Archaeology* (1990) pp.335-338

White, M. V., "The Common Heritage of Mankind: An Assessment" 14 *Case Western Reserve Journal of International Law* (1982) pp.509-542

Williams, S. A., "Recent Developments in Restitution and Return of Cultural Property" 3 *International Journal of Museum Management and Curators* (1984) pp.117-129

Williams, S., "Underwater Heritage, A Treasure Trove to Protect" 87 *UNESCO Sources* (1998) pp.6-16

Wilson, D., "Return and Restitution: A Museum Perspective" in McBryde, I. (ed), *Who Owns the Past?* (1985) Oxford University Press pp.99-106

Yormak, S.R., "Canadian Treasure: Law and Lore" 30(2) *Journal of Maritime Law and Commerce* (1999) pp.229-234

Zhao, H., "Recent Developments in the Legal Protection of Historic Shipwrecks in China" 23 *Ocean development and International Law* (1992) pp.305-333

Books

Anon., *Underwater Archaeology: A Nascent Discipline* (1972) UNESCO Publishing

Anon., *The Protection of Movable Cultural Properties II: Compendium of Legislative texts, Vol I and II* (1984) UNESCO Publishing

Anon., *Papers from the First Southern Hemisphere Conference on Maritime Archaeology* (1977) Australian Sports Publications

Anon., *Papers Presented at the International Marine salvage Conference* (1988) Offshore Conferences and Exhibitions Ltd, London

Anon., *Protection of the Underwater Cultural heritage: Technical Handbook for Museums and Monuments* (1981) UNESCO Publishing

Anon., *Marine Scientific Research: A Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea* Published by the Office for Ocean Affairs and the Law of the Sea

Allen, B. L., *Coastal State Control Over Historic Wrecks Situated on the Continental Shelf as Defined in Article 76 of the UN Law of the Sea Convention 1982* (1991) Special Publication of the Institute of Maritime Law, University of Cape Town Publication no. 14. 1991

Allen, G and Allen, D., *The Guns of the Sacremento* (1978) Robin Garton

Allen, G and Allen, D., *Clive's Lost Treasure* (1978) Robin Garton

Allott, P., *Eunomia: New Order for a New World* (1990) Oxford University Press

Anderson, J., Brook, C. and Cochrane, A., *A Global World?* (1995) The Open University Press

Babits, L.E. and Van Tilberg, H. (eds.), *Maritime Archaeology: A Reader of Substantive and Theoretical Contributions* (1998) Platinum Press

Badr, G.M., *State Immunity: An Analytical and Prognostic View* (1984) Martinus Nijhoff Publishers

Ballard, R.D., *The Discovery of the Titanic* (1987) Guild Publishing, London

Ballard, R.D., *Explorations: An Autobiography* (1995) Weidenfeld and Nicolson, London

Baller, E., *Communism and Cultural Heritage* (1984) Progress Publishers, Moscow

Bascom, W., *Deep Water, Ancient Ships: The Treasure Vault of the Mediterranean* (1976) David and Charles

Baslar, K., *The Concept of the Common Heritage of Mankind in International Law* (1998) Martinus Nijhoff Publishers

Bass, G.F., *Archaeology Under Water* (1966) Penguin Books

Bator, P.M., *The International Trade in Art* (1982) The University of Chicago Press

Beasant, J., *Stalin's Silver* (1995) Bloomsbury, London

Bekiashev, K. and Serebriaicou, V., *International Marine Organisations: Essays on Structure and Activities* (1981) Martinus Nijhoff Publishers

Blackman, D. J. (ed.), *Marine Archaeology: Proceedings of the 23 Symposium of the Colston Research Society Held in University of Bristol* (1971) London Butterworths

Blackman, D.J., *Marine Archaeology* (1973) Butterworths

Blott, J-Y., *Underwater Archaeology: Exploring the World Beneath the Sea* (1996) Thames and Hudson Ltd.

Brice, G., *Maritime Law of Salvage* 3rd edition (1999) Sweet and Maxwell, London

Broad, W.J., *The Universe Below: Discovering the Secrets of the Deep Sea* (1997) Simon and Schuster

Brodie, N., Doole, J. and Watson. P., *Stealing History: The illicit trade in cultural material* (2000) The McDonald Institute for Archaeological Research

Brownlie, J., *Basic Documents in International Law* 4th ed. (1995) Oxford University Press

Burnham, B., *The Protection of Cultural Property: A Handbook of National Legislation* (1974) The International Council of Museums

Craig, P and De Burca, G., *EU Law: Texts, Cases and Materials* 2nd edition (1998) Oxford University Press

Cunningham, R.B., *Archaeology, Relics and the Law* (1999) Carolina Academic Press

Cussler, C., *The Sea Hunters* (1996) Simon and Schuster, London

Danilenko, G.M., *Law-Making in the International Community* (1993) Matinus Nijhoff Publishers

Darling, G. and Smith, C., *LOF 90 and the New Salvage Convention* (1991) Lloyd's of London Press

Delgado, J.P. (ed.), *Encyclopaedia of Underwater and Marine Archaeology* (1997) British Museum Press

Dixon, M., *Textbook on International Law* 3rd Edition (1996) Blackstone Press Ltd

Dixon, M and McCorquodale, R., *Cases and Materials on International law* 3rd edition (2000) Blackstone Press

Dromgoole, S.(ed.), *Legal Protection of the Underwater Cultural heritage: National and International Perspectives* (1999) Kluwer Law International

Douglas, M. and Isherwood. B., *The World of Goods* (1979) Basic Books Inc.

Duboff, L.D. (ed.), *Art Law: Domestic and International* (1974) Fred B. Rothman & Co.

Dugard, J., *International Law: A South African Perspective* (1994) Juta & Co, Ltd

Duncan Mathewson III, R., *Treasure of the Atocha* (1986) Sidgwick and Jackson

Dupuy, R. J and Vignes, D., *A Handbook on the New Law of the Sea* Vol. I (1991) Martinus Nijhoff Publishers

Featherstone, M., *Global Culture: Nationalism, Globalisation and Modernity* (1990) Sage Publications

Feliciano, H., *The Lost Museum* (1997) Basic Books

Fenwick, V and Gale, A., *Historic Shipwrecks: Discovered, Protected and Investigated* (1999) Tempus Publishing, Stroud

Gould, R. A., *Shipwreck Anthropology* (1983) School of American Research

Green, E.L., *Ethics and Values in Archaeology* (1984) The Free Press

Green, J., *Maritime Archaeology : A Technical Handbook* (1990) Academic Press

Greenfield, J., *The Return of Cultural Treasures* (1989) Cambridge University Press

Hajnal, P. I., *Guide to United Nations Organisation, Documentation and Publishing* (1978) Oceana Publications

Henkin, L., *The Age of Rights* (1990) Columbia University Press

Higgins, R., *Problems and Process: International law and how we use it* (1994) Clarendon Press

Hutt, S., Blanco, C.M. and Varmer, O., *Heritage resources Law: Protecting the Archaeological and Cultural Environment* (1999) John Wiley and Sons Inc.

Hutter, M and Rizzo, I. (eds.), *Economic Perspectives on Cultural Heritage* (1997) MacMillan Press

Illsley, J.S., *An indexed bibliography of underwater archaeology and related topics* (1996) The International Maritime Archaeology Series vol. III, University of Oxford

Isar, Y.R., *The Challenge to Our Cultural Heritage: Why Preserve the Past?* (1986) UNESCO Publishing

Jeffery, W. and Ames, J., *Proceedings of the Second Southern Hemisphere Conference on Maritime Archaeology* (1983) South Australian Department of Environment and Planning

Jessop, K., *Goldfinder* (1998) Simon and Schuster, London

Jote, K., *International Legal Protection of Cultural Heritage* (1994) Jurisförlaget

Kayle, A., *Salvage of the Birkenhead* (1990) Southern Book Publishers, Johannesburg

Kifle, J., *International Legal Protection of Cultural Heritage* (1994) Jurisförlaget

Kinder, G., *Ship of Gold in the Deep Blue Sea* (1998) The Atlantic Monthly Press, New York

King, T.F., *Cultural resource Laws and practise: An Introductory Guide* (1998) AltaMira Press

Knight, G. and Chiu, H., *The International Law of the Sea: Cases, Documents and Readings* (1991) Elsevier Scientific Publishers

Lalive, P. (ed.), *International Sales of Works of Art* (1990) Kluwer Law and Taxation Publishers

Langley, S. and Unger, R. W., *Nautical Archaeology Progress and Responsibility* (1984) Bar International Series

Levi, W., *Contemporary International Law: A Concise Introduction* 2nd edition (1991) Westview Press

Lévy, J-P. and Gunnar, G.S., *United Nations Conference on Straddling Stocks and Highly Migratory Fish Stocks: Selected Documents* (1996) Martinus Nijhof Publishers

MacFarlane, L.J., *The theory and practise of human rights* (1985) Temple Smith, London

Mangone, G. J., *United States Admiralty Law* (1997) Kluwer Law International

Mankabady, S., *The International Maritime Organisation* (1984) Croom Helm, London

Marx, R.F., *Shipwrecks in the Americas* (1987) Dover Publications

McBryde, I. (ed.), *Who owns the Past?* (1985) Oxford University Press, Melbourne

McCluskie, T, Sharpe, M and Marriott, L., *Titanic and Her Sisters Olympic and Brittanic* (1999) Parkgate Books, London

McGrail, S., *Aspects of Maritime Archaeology and Ethnography* (1982) Trustee's of National Maritime Museum

McKee, A., *How We Found the Mary Rose* (1982) Souvenir Press

Makarcyk, J. (ed.), *Theory of International law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) Kluwer Law International

Messenger, P.M. (ed.), *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (1989) University of New Mexico Press

Meyer, K., *The Plundered Past* (1973) Atheneum

Miller, H. C., *International Law and Marine Archaeology* (1973) Academy of Applied Science, Belmont, Mass. USA

Morell, J.B., *The Law of the Sea: An Historical Ananlysis of the 1982 Treaty and Its Rejection by the United States* (1992) McFarland & Company, Inc.

Morris, R., *Island Treasure: The Search For Sir Cloudesley Shovell's Flagship 'Association'* (1969) Hutchinson & Co Publishers, London

Morris, R., *HMS Colossus: The Story of the Salvage of the Hamilton Treasures* (1979) Hutchinson & Co Publishers, London

Muckelroy, K., *Archaeology Underwater: An Atlas of the World's Submerged Sites* (1980) McGraw-Hill Book Co. London

Muckelroy, K., *Discovering a Historic Wreck* (1981) National Maritime Museum, Handbooks in Maritime Archaeology No. 1

Nieć, H.(ed.), *Cultural Rights and Wrongs* (1998) UNESCO Publishing and Institute of Art and Law

Nordquist, M.H., *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol.1 (1985) Martinus Nijhoff Publishers

Nordquist, M.H., *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. 5 (1989) Martinus Nijhoff Publishers

Norris, M.J., *The Law of Salvage* (1958)

Norway, A.M., *The Post Office Packet Service* (1895) Macmillan

O'Connell, D.P., *International Law* 2nd edition (1970)

O'Keefe, P.J., *Trade in Antiquities: Reducing Destruction and Theft* (1997) UNESCO Publishing

Osmanczyk, E., *The Encyclopaedia of the United Nations and International Agreements* (1985) Taylor and Francis

Palmer, N. and McKendrick, E. (eds.), *Interests in Goods* (1993) Lloyd's of London Press Ltd

Palmer, N. (ed.), *The Recovery of Stolen Art: A collection of essays* (1998) Kluwer Law International

Pickford, N., *The Atlas of Ship Wrecks and Treasure* (1994) Dorling-Kindersley

Payoyo, P.B., *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (1997) Martinus Nijhoff Publishers

Postyshev, V., *The Concept of the Common Heritage of Mankind: From New Thinking to New Practise* (1990) Progress Publishers

Prott, L.V. and O'Keefe, P.J., *Law and the Cultural Heritage: Volume 1, Discovery and Excavation* (1984) Professional Book Ltd.

Prott, L.V. and O'Keefe, P.J., *Law and the Cultural Heritage: Volume 3, Movement* (1989) Butterworths

Prott, L.V., Planche, E. and Roca-Hachem, R., *Background Materials on the Protection of the Underwater Cultural Heritage* Vol.2 (2000) UNESCO Publishing

Prott, L.V. and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO Publishing

Pickford, N., *The Atlas of Shipwrecks and Treasure* (1994) Dorling Kindersley, London

Reisman, W.M. (ed.), *Jurisdiction in International Law* (1999) Ashgate Dartmouth

Reuter. P., *Introduction to the Law of Treaties* (1989) Pinter Publishers

Roach, J.A. and Smith Robert, W., *United States Responses to Excessive Maritime Claims* 2nd ed. (1996) Martinus Nijhoff Publishers

Robinson, C.M., *Shark of the Confederacy: The Story of the CSS Alabama* (1995) Leo Cooper, London

Saba, H., *The Protection of Movable Property II: Compendium of Legislative Texts* (1984) UNESCO Publishing

Sandborn, F. R., *Origins of the Early English Maritime and Commercial Law* (1930) The Century Co. London

Shaw, M.N., *International law* 4th edition (1997) Cambridge University Press

Simpson, E. (ed.), *The Spoils of War* (1997) Harry N Abrams Inc. Publishers

Smith, A.D., *Nations and Nationalism in a Global Era* (1995) Polity Press, Cambridge

Soons, A.H.A., *Marine Scientific Research and the Law of the Sea* (1992) Kluwer Publishers

Steiner, H.J. and Alston, P., *International Human Rights in Context: Law, Politics, Morals*" 2nd edition (2000) Oxford University Press

Strati, A., *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (1995) Martinus Nijhoff Publishers

Suter, K., *Antarctica: Private Property or Public Heritage?* (1991) Zed Books, London

Toman, J., *The Protection of Cultural Property in the Event of Armed Conflict* (1996) Dartmouth/UNESCO Publishing

Throckmorton, P., *The Sea Remembers: Shipwrecks and Archaeology* (1987) Artists House

Treves, T., *The Laws of the Sea: The European Union and its Member States* (1997) Martinus Nijhof Publishers

Van der Molen, S. J., *The Lutine Treasure* (1970) Adlard Coles Limited, London

Van Dyk, J. M. (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985) Law of the Sea Institute; University of Hawaii

Van Meurs, L. H., *Legal Aspects of Marine Archaeological Research* (1985) Special Publication of Institute of Maritime Law: University of Cape Town Vol. 1

Vincenzini, E., *International Salvage Law* (1992) Lloyd's of London Press Ltd

Vocler, J., *The Global Commons - A Regime Analysis* (1995) John Wiley & Sons

Watts, G.P (ed), *Underwater Archaeology: The Challenge Before Us: The Proceedings of the Twelfth Conference on Underwater Archaeology* (1981) Fathom Eight

Weiss, E. B., *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989) United Nations University, Transnational Publishers

Wels, S., *Titanic: Legacy of the Worlds Greatest Ocean Liner* (1997) Tehabi Books and Time Life Books

Williams, M., *Deep Sea Treasure* (1981) Heinemann London

Williams, S., *The International and National Protection of Movable Cultural Property. A Comparative Study* (1978) Oceana Publications

Yudhishthir, R.I. (ed.), *The Challenge to Our Cultural Heritage. Why Preserve the Past?* (1984) UNESCO Publishing

Theses

Blake, J.A., *A Study of the Protection of Underwater Archaeological Sites and Related Artefacts with Special Reference to Turkey* (1996) Unpublished PhD Thesis, University of Dundee

Carman, R.J., *Valuing Ancient Things: Archaeology and Law in England* (1993) Unpublished PhD Thesis, University of Cambridge

Dromgoole, S., *Law and the Underwater Cultural Heritage: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom* (1993) Unpublished PhD Thesis, University of Southampton

Firth, A.J., *Managing Archaeology Underwater* (1996) Unpublished PhD Thesis, University of Southampton

Giesecke, A.G., *Historic shipwreck resources and state law: a development perspective* (1992) Unpublished PhD Thesis, Catholic University of America

Tanner-Kaplash, S., *The Common Heritage of All Mankind: A Study of Cultural Policy and Legislation Pertinent to Cultural Objects* (1989) Unpublished PhD Thesis, University of Leicester

Strati, A., *The Protection of the Underwater Cultural Heritage as an Emerging Objective of the Contemporary Law of the Sea* (1988) PhD Thesis, University of Wales, Cardiff (see *supra* for subsequent publication)

Conference papers

Bederman D.J., "Historic Salvage and the Law of the Sea" transcript of paper Presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, Florida, March 30-31 1998

Clement , E., "Development of an international convention on the protection of the underwater cultural heritage" transcript of paper presented at the Proceedings of the Thirty First Annual Law of the Sea Institute, University of Miami, Florida, 30-31 March 1998

Gribble, J., "The Doddington Gold Coins" transcript of paper presented at the World Archaeological Congress, University of Cape Town, South Africa 10-14th January 1999

Hayashi, M., " Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea" transcript of paper presented at the Conference on the Protection of Underwater Cultural Heritage, National Maritime Museum, London 3-4 February 1995

King, T.F., "Losers, Weepers: The Great Historic Shipwreck Debate" transcript of paper presented at the National Trust for Historic Preservation Conference, US, 7 October 1992

Roach., J.A., "Shipwrecks: Reconciling Salvage and Underwater Archaeology" transcript of paper presented at the Proceedings of the Thirty First Annual Law of the Sea Institute, University of Miami, Florida, 30-31 March 1998

Stemm. G., "Protection of out Underwater Cultural heritage: Thoughts on the Future of Historic Shipwrecks" transcript of paper presented at the Thirty First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998

Swan, J., "Implementation of the Law of the Sea Convention Straddling and Highly Migratory Fish Stocks and High Seas Fishing" transcript of paper Presented at the Thirty First Annual Conference of the Law of the Sea Institute, University of Miami,
30-31 March 1998

Sweeney. J.P., "The American Law of Treasure Salvage" transcript of paper presented at the 1998 Maritime Law Symposium*: Sunken Treasure: Law, Technology and Ethics*. Roger Williams University, Bristol, Rhode Island 13 - 15 August 1998

Varmer, O., "Should there be such a thing as Treasure Salvage" transcript of paper presented at the 1998 Maritime Law Symposium: Sunken Treasure: Law, Technology and Ethics. Roger Williams University, Bristol, Rhode Island 13 - 15 August 1998

Williams, M.V., "Memorial Rights to Wreck" transcript of paper presented at NAS Conference, University of Plymouth 1996

Internet

Booysen, H., "International law as legal system: the quest and the need for a private-law leg" downloaded from *http://home.yebo.co.za/~interlegal/private-leg.htm*

Clancy, E.A., "The Tragedy of the Global Commons" 5(2) *Indiana Journal of Global Legal Studies* (1997) downloaded from *http://www.law.indiana.edu/gjls*

Gee, A.L and Lopez, A., "Pride from the Deep: The ocean bed delivers proof of the Philippines' role in Asia's trading history" downloaded from *http://cnn.com/ASIANOW/asiaweek/96/1129/feat3.html*

Hobe. S., "Global Challenges to Statehood: The Increasingly Important Role of Non-governmental Organisations" 5(1) *Indiana Journal of Global Legal Studies* (1997) downloaded from *http://www.law.indiana.edu/gjls*

Scheider, M., "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects" Research Paper, UNIDROIT, Rome, 28 November 1995 downloaded from
http://www.city.ac.uk/artspol/schneider.html

Stemm, G., "An overview of 1998 UNESCO Meeting in Paris" downloaded from *http;//www.prosea.org/articles-news/overview_98_UNESCO_Meeting.html*

Magazines

Anon., "All at Sea and Undefended" *British Archaeology News* (September 1994) p.7

Anon., "Mint *Duoro* coins draw the bidding" *Diver* (January 1997) p.46

Anon., "Will the *Hanover* yield a fortune in gold?" *Diver* (December 1996) p.59

Anon., "*Hanover* – is the treasure still on board?" *Diver* (January 1997) p.47

Cowan, R., "Wreck divers face a worldwide threat" *Diver* (October 1998) pp.40-41

Delgado, J. P., "Wrecks within National Boundaries" 49 *Archaeology* (May/June 1996) p.47

Delgado, J.P., "Lure of the Deep" 49 *Archaeology* (May/June 1996) p.43

Giesecke, A.G., "Abandonment in the Supreme Court" *Sea Technology* (November 1997) p.97

Goodheart, A., "Take It or Leave IT" *Preservationist* Jan.-Feb. pp.36-45

McDonald, K., "Breech of the law" *Diver* (December 1999) p.75

Stemm, G., "The Key to Davy Jones' Locker: Part One" *Ocean News and Technology* (March/April 1996) pp.14-15

Stemm, G., "The Key to Davy Jones' Locker: Part One" *Ocean News and Technology* (May/June 1996) pp.14-15

Summers, J., "Ten days on the Cazador" *Diver* (June 1996) pp.86-89

Velocci, T., "Treasure Hunting: There's gold in them thar Galleons" *National Business* (August 1980) pp.58-62

Walsh, D., "New Code of Ethics Strikes Balance Between Archaeology and Salvage" *U.S. Naval Institute Proceedings* (October 1999) p.88

Newspapers

"Wreck plunderers find way through law on war graves: Battleship Royal Oak" *The Times*, April 4, 1994

"Shipwreck gives up her hoard of perfect porcelain" *The Times*, January 25, 1995

"Golden treasure from shipwreck to fetch £1.5m" *The Times*, September 7, 1996

"Wreckfinder hits £50m crock of gold" *Sunday Times*, October 27, 1996

"Clive of India's Gold Found in Pirate Wreck" *The Times*, September 29, 1997

"Sunken treasures in peril" *Guardian*, June 10, 1999

"Titanic man finds world's oldest ships 1,000ft down" *The Sunday Times*, June, 27 1999

"Pirates sink low, steal cannons from St.Augustine shipwreck "*Florida Times*, August 4, 1999

"Hunt for treasure, but it'll cost a pretty boubloon" *St.Petersberg Times*, September 1, 2000

"Fleet of Medieval Ships Discovered in Britain" *The Independent,* October 24, 2000

"Divers Looting Sunken D-Day War Graves" *The Independent,* October 31, 2000

Miscellaneous

Application Guidelines for Underwater Archaeological research Permits on Submerged Cultural Resources Under the Jurisdiction of the Department of the Navy: United States Department of defence: Department of the Navy, 32 CFR Part 767, RIN 0703- AA57

Digest of United States Practise in International Law Vol.8 pp.999 – 1006

Agreement Regarding the MS/Estonia, 6 November 1995, printed in 20(4) *Marine Policy* (1996) pp.355-356

Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks 1972 reprinted in Prott, L.V. and Srong, I., *Background Materials on the Protection of the Underwater Cultural Heritage* (1999) UNESCO pp. 75-78

Management Plan for Florida's Submerged Cultural Resources: A Report by Florida Department of State, Division of Historical Resources, Bureau of Archaeological Research

Heritage at Sea: Proposals for the better protection of archaeological sites underwater, Compiled by the Joint nautical Archaeological Policy Committee (May 1989) Published by the national maritime Museum

Heritage at Sea, Compiled by Joint Nautical Archaeology Policy Committee (2000), Published by University of Wolverhampton

Summary Report of the National Maritime Museum Conference on Protection of Underwater Cultural Heritage, Greenwich 3-4 February 1995

Criteria for the Identification of Important Historic Vessel Remains, and for the Designation of Restricted Areas under the terms of the Protection of Wrecks Act 1973 produced by UK Department of Culture, Media and Sport.

King, T.F., "Why the State of Maryland should permit the commercial salvage of submerged historic properties" A report to governor William Donald Shaefer's advisory committee on maritime archaeology (1987)

Sunken Naval Vessels and Naval Aircraft Wreck Sites; fact sheet produced by United States Department of the Navy Policy Fact Sheet

UNESCO Documents

Doc. 141 EX/18, Paris, 26 March 1993
Report by the Director-General on the reinforcement of UNESCO's action for the protection of the world cultural and natural heritage

Doc.146 EX/27, Paris, 23 March 1995
UNESCO Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural heritage

Doc. 28C/39, Paris, 4 October 1995
Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage

Doc. 28C/39 Add., Paris, 31 October 1995
Addendum to Feasibility Study on the Drafting of an Intentional Instrument for the protection of the Underwater Cultural Heritage

CLT-96/CONF.605/6, Paris, 22-24 May 1996
Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage

Doc. 151 EX/Decisions, Paris, 3 July 1997
Decisions adopted by the Executive Board at its 151st Session

Doc. 29C/22, Paris, 5 August 1997
Report by the Director-General on Action Taken Concerning the Desirability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage

CLT-98/CONF.202/7, Paris, 29 June - 2 July 1998
Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage

CLT-96/CONF.202/5 Paris, April 1998
Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-96/CONF.202/5 Rev, Paris, April 1999
Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-99/CONF.204/5, Paris, April 1999
Synoptic report of comments on the Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-99/WS/8, Paris, April 1999
Draft Convention on the Protection of the Underwater Cultural heritage: A Commentary prepared for UNESCO by Dr. Anastasia Strati

CLT.99/CONF.204/CLD.7, Paris, 23 April 1999
Working Group 1: Results

CLT.99/CONF.204/CLD.8, Paris, 23 April 1999
Results of Working Group 2: Rules Concerning [Activities Directed At] Underwater Cultural Heritage

CLT.99/CONF.204/CLD.9, Paris, 23 April 1999
Working Group 3: Results

CLT.99/CONF.204/CLD.10, Paris, 23 April 1999
Revised Articles 8-18 – Except 14 Proposed by the Chairman

CLT-96/CONF.202/5 Rev.2, Paris, July 1999
Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-99/CONF.204, Paris, August 1999
Final Report of the Second Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage

CLT-2000/CONF.201/3, Paris, April 2000
Synoptic Report of comments on the Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-2000/CONF.201/3add, Paris, June 2000
Addendum to Synoptic Report of comments on the Draft Convention on the Protection of the Underwater Cultural Heritage

CLT-2000/CONF.201/9, Paris, 7 July 2000
Working Group 1: Report of the Chairman of Working Group to the Plenary

CLT-2000/CONF.201/8, Paris, 5 July 2000
Results of Working Group 2

CLT-2000/CONF.201/10, Paris, 7 July 2000
Chairman's Report for Working Group 3: The Annex

CLT-2000/CONF.201/7, Paris, 21 August 2000
Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection on the Underwater Cultural Heritage

United Nations

Doc. A/RES/53/32, 6 January 1999
Resolution 53/32 on oceans and the law of the sea adopted by the General Assembly

Doc. A/Res/54/31, 18 January 2000
Resolution 54/31 on oceans and the law of the sea adopted by the General Assembly

Doc. GA/L/3129, 2 November 1999
United Nations Press Release "Sixth Committee concludes consideration of draft on State responsibility"

Doc. GA/L/3122, 28 October 1999
United Nations Press Release "Legal Committee considers bearing of global commercial trends on question of jurisdictional immunity of States"

Council of Europe

Resolution from the International Workshop on Mediterranean Harbours of Antiquity June 1983

Doc. 4200-E, Strasbourg, 1978
The Underwater Cultural heritage: Report of the Committee on Cultural heritage and Education

Doc. CAHAQ(85)5, Strasbourg, 23 April 1985
Draft European Convention on the Protection of the Underwater Cultural Heritage

CDCC Misc (94)
Draft List of Cultural rights (Strasbourg, August 1994)

International Law Association

ILA Sixty-Fourth Conference, *Report of the International Committee on Cultural Heritage Law*, (1990) Queensland, Australia pp.1-17

ILA Sixty-Fifth Conference, *Report of the International Committee on Cultural Heritage Law*, (1992) Cairo, Egypt pp.338-365

ILA Sixty-Sixth Conference, *Report of the International Committee on Cultural Heritage Law*, (1994) Buenos Aires, Argentina pp. 432-451

ILA Sixty-Seventh Conference, *Report of the International Committee on Cultural Heritage Law*, (1996) Helsinki, Finland pp.327-335

ILA Sixty-Eighth Conference, *Report of the International Committee on Cultural Heritage Law*, (1998) Taipei, Taiwan, Republic of China pp. 217-238

ILA Sixty-Ninth Conference, *Report of the International Committee on Cultural Heritage Law*, (2000) London, United Kingdom pp.1-16